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Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1961
CERTIORARI GRANTED DECEMBER 4, 1961

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,779

BERNARD SILBER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal From the United States District Court for the District of Columbia

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JOINT APPENDIX

Filed August 4, 1958

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on June 26, 1958,
Sworn in on July 1, 1958.

Criminal No. 753-58

Grand Jury Original

2 U.S.C. § 192

UNITED STATES OF AMERICA

v.

BERNARD SILBER

The Grand Jury charges:

Introduction

On August 2, 1957, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to the Legislative Reorganization Act of 1946, Section 121(Q), (60 Stat. 828), and to H. Res. 5, 85th Congress.

Defendant, Bernard Silber, appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions.

The allegations of this Introduction are adopted and incorporated into the Counts of this indictment which follow, each of which Counts will in addition merely set forth the question which was asked of the defendant and which he refused to answer.

COUNT ONE

"Was he [the person who recruited defendant in the Communist Party] a communications worker?"

COUNT TWO

"We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists."

COUNT THREE

"Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?"

COUNT FOUR

"Were any of the present officers of your union members of the Communist Party at the time you were in the Party?"

United States Attorney in and for the District of Columbia

A TRUE BILL:

Foreman.

Filed September 16, 1958

Motion to Dismiss Indictment

The defendant moves that the indictment be dismissed on the following grounds:

1. The Legislative Reorganization Act of 1946, § 121(q), 60 Stat. 828 and House Resolution 5, 85th Congress, purport to authorize the House Committee on Un-American Activities to conduct investigations into the exercise of the

freedom of belief, speech, press and assembly, as to which the First Amendment to the Constitution of the United States provides that "Congress shall make no law" and such resolution and statute are therefore unconstitutional.

2. The statute and resolution referred to above are vague and indefinite and the committee's inquiry thereunder may not be a basis for indictment by reason of the requirements of the Fifth and Sixth Amendments to the Constitution.

3. The question set forth in each of the counts of the indictment constitutes an inquiry into the defendant's personal and private affairs and associations and into his political beliefs and associations which are subjects beyond the jurisdiction of the said Committee on Un-American Activities under the First and Tenth Amendments to the Constitution and under the statute and resolution above referred to.

4. The questions set forth in each of the counts of the indictment on their face cannot be pertinent or material to any subject within the jurisdiction of the House Committee on Un-American Activities within the statute and resolution above referred to.

5. The indictment fails to set forth the question under inquiry before the subcommittee of the Committee on Un-American Activities on July 18, 1957.

6. The indictment does not state facts sufficient to constitute an offense against the United States.

7. The indictment was not found by a sufficient number of qualified and unbiased grand jurors. Court records show that fifteen members of the grand jury that indicted defendant were employees of the Federal Government.

Filed September 25, 1958

Motion for a Hearing on the Qualifications of the Grand Jurors

The defendant moves the Court for an order setting a hearing for the purpose of inquiring into the qualifications of the grand jurors in this proceeding.

In support of this motion the defendant states that the list of grand jurors shows that fifteen members of the grand jury which indicted the defendant were employees of the United States Government. Two others are married women and may be wives of government employees.

The hearing on the qualifications of the grand jurors is requested so that the defendant may produce evidence in such hearing that government employees as a class may not properly sit on grand juries to return the indictment herein because governmental pressures relating to the loyalty and security of government employees prevents such employees from being or appearing to be unbiased in this case.

In this connection it will be noted that a number of the members of the grand jury were employed in government departments in which security regulations are quite stringent. One of the members of the grand jury was employed by the Army Chemical Corps; a second at the Naval Gun Factory and a third at the Naval Research Laboratory. A fourth member of the grand jury was employed as a clerk in the Department of the Army.

An additional reason exists here for such a hearing because one of the members of the grand jury is employed as a clerk in the United States Department of Justice. Quite aside from general security considerations which apply to such an employee, a hearing is necessary to determine whether the nature of her work was such that she had some connection with this matter or with general policy relating to similar matters in the course of her employment.

In addition, the defendant wishes to have an opportunity to examine each of the government employees who sit on

the grand jury with respect to the influence upon such juror of the loyalty and security programs of the government in the light of the nature of this case and to prove, as a result of such examination, the existence of actual bias on the part of said grand juror against the defendant.

Filed September 25, 1958

Offer of Proof in Connection With Motion for Hearing on the Qualifications of the Grand Jurors

The defendant, in support of his motion for a hearing on the qualifications of the grand jurors who indicted him, offers to prove at such a hearing that governmental pressures and the climate of opinion against government employees prevented them as a class from being or appearing to be impartial and unbiased grand jurors in the defendant's case. The evidence which the defendant will adduce for this purpose includes the following:

1. Government employees who have been attacked and accused of alleged disloyalty by congressional figures, including Senators McCarthy, Jenner, McCarran and Eastland and Congressmen Velde and Walter, have been constantly harassed and subjected to abuse and threats and their positions have been jeopardized. Many government employees have been forced to resign because of these chargs and one, who has been frequently attacked in the Senate, was discharged after having twice been cleared by loyalty boards of his agency.

2. In a number of previous cases allegedly involving "security", judges and jurors have been attacked by members of Congress and other governmental officials whenever such judge or jurors took any action that displeased these Congressmen. Thus, there was open criticism of the judge who presided at the first Hiss trial and of the jurors who voted to acquit the defendant in that case. Supreme Court Justice William O. Douglas was threatened with impeach-

ment because he issued a stay in the Rosenberg case. Appellate judges have been criticized on the floor of the Senate and threatened with investigation because of their granting of bail to Harry Bridges. Judge Metzger of Hawaii was denied reappointment as a judge because he fixed bail for a group of defendants at a sum lower than that recommended by the Department of Justice. And most notorious of all was the widespread criticism of many members of the United States Supreme Court and of the Court as a whole voiced on the floor of both the House and the Senate during this past session of Congress as a result of the Court's decisions in the Nelson, Service, Cole, Watkins, Sweezy and other similar cases in the general field of "subversive activities."

3. Executive Order 10450 provides that the test as to whether an employee of the government was to be retained was whether he is a "security risk." The issuance of this Executive Order was accompanied by statements of the Attorney General and other leading officials of the Administration that under this Executive Order alleged security risks who had survived inquiry under previous loyalty orders would be cleared out of the government and that all doubts as to their security would be resolved in favor of the government. Under this Executive Order, persons are to be retained in the federal service only if their retention "is clearly consistent with the interests of the national security." One of the standards to be considered in making this consideration is "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy."

4. The New Executive Order and the administration thereof has been attended with a great deal of publicity. There was also widespread criticism of the manner in which the loyalty program had operated under the previous Administration. There was thus created a general fear among government employees that their jobs were in jeopardy and that they could be discharged under the security program

for the slightest departure from official administration policy.

5. This situation was further intensified by public investigations of government employees carried on by Senators McCarthy and Eastland and by Congressman Walter. In the course of these investigations and charges it was alleged that the general loyalty program under the previous Administration had been badly administered and that specific individuals who sat on loyalty boards which gave clearance to government employees were themselves of doubtful loyalty. It has thus been made clear to government employees that supporting, defending or voting in favor of any individual accused of Communism or disloyalty would in itself raise suspicions of disloyalty. Government officials attacked by congressional committees on this ground have been disciplined. Others, though not formally disciplined, have been made subject to investigations and unfavorable publicity and had their government careers seriously jeopardized.

6. As a result of such incidents and many others involving the operation of the loyalty and security programs of the government, there exists among government employees and their families, as numerous and competent qualified observers can testify, a climate of fear of being charged with disloyalty or of being a "security risk" on account of opinions, beliefs, associations and actions, which inevitably influences the vote of a government employee serving as a juror in a case such as the defendant's. See, e. g., Barth, The Loyalty of Free Men; Jahoda & Cook, Security Measures and Freedom of Thought, an Exploratory Study of the Impact of Loyalty and Security Programs (1952) 61 Yale Law Journal, 295; Brown, 6,000,000 Second Class Citizens, The Nation, June 28, 1952, Volume 175, p. 644.

7. Under the standards and practice of the loyalty and security programs of the government, it would be almost inevitable that loyalty and security boards would take into

account how government employees and members of their families sitting as grand jurors in the defendant's case voted.

8. Even if loyalty and security boards did not take such matters into account, government employees and their families believe, and have reason to believe, that loyalty and security boards and loyalty and security investigations would take into consideration how they voted as grand jurors in the defendant's case.

9. The discipline and environment which condition and surround government employees, the expressed opinions of high government officials and the policies government employees carry out create in such employees as a class a predisposition which prevents them as a class from being, or appearing to be, impartial grand jurors in a case such as defendant's.

10. The government employees who voted to indict the defendant were because of the pressures and climate and the other factors described, unfair and biased grand jurors in the defendant's case.

Filed January 18, 1960

Order

Upon consideration of the points and authorities filed and the oral arguments made by both sides, it is by the Court this 18th day of January, 1960,

ORDERED that defendant's Motion for a Bill of Particulars and Motion for a Hearing on the Qualifications of the Grand Jurors be and they are hereby denied.

s/ F. DICKINSON LETTS
Judge

Memorandum and Order

At the hearing January 18, 1960 the motion of the defendant to dismiss the indictment was by agreement of counsel to be treated as a motion to strike count two of the indictment.

Defendant's motion to dismiss the indictment being so treated is sustained and accordingly the Court strikes count two of the indictment.

F. Dickinson Letts
Judge

January 29, 1960

Judgment

On this 14th day of April, 1960, by counsel, David Rein, Esq., came the attorney for the government and the defendant appeared in person and finding of guilty.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and of the offense of violation of Title 2, U.S.C., Section 192 as charged in counts 1, 3, and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) months and to pay a fine of One Hundred ($100.00) dollars.

It Is Adjudged that

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal

or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JOSEPH C. McGARRAGHY
(Seal) *United States District Judge.*

A True Copy. Certified this 14th day of April, 1960.

(By) STEPHEN A. MAYNAHON

Deputy Clerk.

(Signed) HARRY M. HULL
Clerk.

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1 THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 753-58

THE UNITED STATES OF AMERICA

versus

BERNARD SILBER

March 22, 1960
Washington, D. C.

The above-entitled matter came on for hearing before The HONORABLE JOSEPH C. McGARRAGHY, a United States District Judge, at 10:00 A. M.

APPEARANCES:

For the Government:

William Hitz, Esquire

For the Defendant:

Victor Rabinowitz, Esquire

• • • • • • • • • •

11 **Richard Arens**

was called as a witness by the Government and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hitz:

Q. Mr. Arens, will you give your full name, please? A. Richard Arens.

Q. Your occupation, sir? A. Staff director of the Committee on Un-American Activities of the United States House of Representatives.

Q. How long have you been with that Committee? A. Approximately four years.

Q. Before that were you with other Congressional Committees? A. Yes, sir.

Q. Will you name them in reverse order, please? A. I was staff director of the Internal Security Sub-Committee of the Committee on Judiciary of the United States Senate, and also staff director of the Committee on Immigration and Naturalization of the United States Senate.

Q. Did you have occasion while with either one of those Senate Committees to conduct investigation with ref-
12 erence to the communications industry. Just answer I did or did not? A. I did.

Q. Now did a time come prior to July 1957 when you discussed with the Un-American Activities Committee members the advisability of conducting an investigation with respect to the infiltration by Communist elements of the communications industry? A. Yes, sir.

Q. About when did those discussions with the Committee commence? A. Shortly after I became staff director of the Committee which was in the spring of 1956.

Q. Did a time come when the Committee decided to conduct an investigation? A. Yes, sir.

Q. And in what fashion did they make that decision, to your knowledge? A. In executive session of the Committee.

Q. Can you tell us approximately when it was and what they did? A. In the course of the Committee's deliberations they would ask me as staff director the various fields which we were in a position to explore and the fields in which we would have a lead information. I would repeatedly—

Mr. Rabinowitz: Your Honor, I object to what the
13 Committee did ask and what he would answer. I think if he had a conversation I think he might offer to testify to that. It isn't clear to me whether he is testifying to one conversation or to another.

The Court: I think the objection is well taken, and the objection is sustained.

Mr. Hitz: I think that is well taken.

By Mr. Hitz:

Q. Would you tell us what you recall that the Committee did or said rather than what— A. Yes, the Committee directed we proceed with an investigation looking toward hearings, public hearings in the field of Communist penetration into the communications industry.

Q. Was such a discussion and such a determination made by the Committee at any time when there were a majority or more of the members of the Committee present? A. Yes, sir.

Q. About when would that first take place? A. I couldn't be very precise on that. I would say a short time after I first began alluding to this field as a field of inquiry which would be within a matter of months after I assumed the position of staff director of the Committee.

Q. So that it would be in the year 1956? A. Yes, sir.

Q. In the first or latter part of that year? A.
14 I would say about the middle of the year.

Q. Now at a time subsequent to that and in the year 1957, was the desire and the determination of the Committee to conduct the so-called communication facili-

ties hearings formalized and documented by the Committee? A. Yes, sir.

Q. How was that done? A. Well, after the Committee had made its decision to proceed with the investigation, caused a subpoena to be issued and agreed in general on a time and place to commence the investigation, the counsel to the Committee, Mr. Tavenner, prepared a formal resolution which was passed by the Committee.

Q. Now, have you had occasion to study the Committee report of proceedings against Bernard Silber? A. Yes, sir.

Q. Which is Government's No. 4 and in House Report No. 1241 of the Un-American Activities Committee? A. Yes, sir.

Q. Is the resolution documenting the determination of this Committee to conduct these hearings reproduced in this report? A. The formal resolution is, yes, sir.

• • • • • • • • • •

15 Q. Mr. Arens, are you able to tell us from your present recollection whether or not Bernard Silber was subpoenaed to appear before the Un-American Activities Committee? A. Yes, sir.

Q. Can you give us the date when the subpoena issued? A. By refreshing my recollection from this document which you have just handed me—

Q. Which is Government's 4? A. Which is Government's 4, yes, sir.

Q. At what page thereof? A. On page 1 or 2
16 taken together, the entire document appears, the entire subpoena appears with the return and I am uncertain as to what the question is at the moment.

Q. Well I will ask some questions that may save some time that may perhaps be leading and give counsel an opportunity to object if he cares to.

Does the date of issuance appear on top of page 2 as June 21, 1957? A. Yes, sir.

Q. And the return day of subpoena on page 1 in the middle of the subpoena as July 17, 1957? A. Yes, sir.

Q. And the place to respond was Washington, D. C. A. Yes, sir.

Q. Now are you able to tell us whether or not there was some postponements made for Mr. Silber's appearance? A. Yes, sir.

Q. And ultimately he did appear on August 2, did he, in 1957? A. Yes, sir.

Q. In Washington, D. C. A. Yes, sir.

Q. Do you—by the way who authorized the issuance of the subpoena to Mr. Silber? A. The Chairman of the
17 full Committee, Mr. Walter. Congressman Walter.

Q. Have you knowledge what information the Committee had with respect to Silber that preceded his being subpoenaed? A. I do, yes, sir.

Q. What was that information, to your knowledge? A. That Mr. Silber had been a member of the Communist Party engaged in the communications field.

Q. Mr. Arens, would you turn to page 3 of this report, please? A. Yes, sir.

Q. And read the proceedings for July 17, 1957 as it appears there beginning at the top of that passage United States House of Representatives? A. "United States House of Representatives, Subcommittee of The Committee on Un-American Activities, Washington, D. C., Wednesday, July 17, 1957."

Q. Let me interrupt you there. Mr. Silber was not present at this time was he, sir, before the Committee? A. He was not present on the first day, no, sir.

Q. I see. A. At least I have no recollection of his presence on the first day.

Q. Now will you proceed with the reading? A. "Public Hearing. A subcommittee of the Committee on Un-American Activities met, pursuant to call at 10:10
18 a. m. in the caucus room, Old House Office Building, Washington, D. C., Hon. Clyde Doyle (chairman of the subcommittee) pending.

Committee members present: Clyde Doyle, of California, James B. Frazier, Jr., of Tennessee, and Gordon H. Scherer, of Ohio.

Staff members present: Richard Arens, director, and W. Jackson Jones and Louis J. Russell, investigators.

Mr. Doyle: The subcommittee will please come to order. I have an opening statement, as the subcommittee chairman which I wish to read for the record."

Mr. Rabinowitz: Your Honor, I object to this. It is not in the presence of the defendant and I do not see the relevancy.

Mr. Hitz: This is offered, Your Honor, as a statement by the subcommittee Chairman Doyle, in order to establish pertinency and the fact as distinguished from the awareness of pertinency, and this will be a statement of what this investigation was about. And we believe that to be relevant and material despite the fact Mr. Silber was not there in order to establish actual pertinency as an element of the crime.

Mr. Rabinowitz is, I think, addressing himself to merely what we will later prove which is awareness of pertinency which must be shown either by way of questions or explanations made at the hearing of the witness. We do not offer this for that purpose.

19 Mr. Rabinowitz: I think not, Your Honor. I am objecting to any testimony concerning what somebody said at a hearing at which the defendant was not present. I do not see how that can be chargeable to him.

The Court: You do not suggest it is chargeable to him, do you Mr. Hitz?

Mr. Hitz: Not as an admission nor a failure to deny or anything of that sort, but it is certainly a statement of this committee chairman as to what they are about and if we didn't prove that Mr. Rabinowitz would be the first one to object.

The Court: Oh, I think it is admissible for the purpose for which it is offered. I will overrule the objection.

Mr. Hitz: Thank you, Your Honor.

The Witness: Shall I continue?

Mr. Hitz: Continue. Start where you left off again.

A. (Continuing): "Mr. Doyle: The subcommittee will please come to order. I have an opening statement, as the subcommittee chairman which I wish to read for the record.

The committee has long been interested in the situation which exists in the communications industry in the United States namely, the position and influence held by members of the Communist Party, and organizations dedicated to furthering the Communist objective. On July 10, 1957, at a regular meeting of the committee, with all members except two present and voting, a motion was made by Mr. Scherer and seconded by Mr. Frazier which authorized the holding of these hearings in Washington on this general subject."

Mr. Hitz: Now let me interrupt, please, sir. Your Honor, I think it might be helpful for the record if we can show what was omitted by the asterisks which appear in this report. And if we are permitted to do that and do it, I think we can dispense with the offer at all of the full volume of Part I from which the testimony part of this report is taken, and I would like to endeavor to do that.

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Q. Now will you continue to read after the asterisks on page 3? A. "Congress by Public Law 601 of the 79th Congress, placed upon this committee the duty of investigating the extent, character, and object of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

Congress has also placed upon this committee the duty of exercising continuous watchfulness of the execution by

the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of this committee.

In these hearings beginning now, the first of a series of this general subject, the committee hopes to ascertain the extent of the penetration and control exercised by members of the Communist Party over an industry which is vital to our defense; namely, communications. In the event that testimony given during these hearings reflects a situation correctable by legislation, the committee will recommend the appropriate measures at the proper time. It is the purpose of the subcommittee in the conduct of these hearings, to discharge the duties placed upon us by the Congress by calling witnesses who, we have reason to believe, possess information which will be of value to us and to the Congress in the consideration of such legislation. It is a standing rule of this committee that any person named in the course of committee hearings will be given an early opportunity to appear before this committee if he so desires, for the purpose of denying or explaining any testimony given adversely affecting him. In the event there are such persons, they should immediately communicate with any member of the staff and make their request known.

In every hearing, the committee has encouraged witnesses to have legal counsel with them if they so desire, and has always welcomed the presence of counsel. In fact, the rules of the committee expressly provide that --"at every hearing, public or executive, every witness shall be accorded the privilege of having counsel of his own choosing.

"The participation of counsel during the course of any hearing and while the witness is testifying shall be limited to advising said witness as to his legal rights. Counsel shall not be permitted to engage in oral argument with the committee, but shall confine his activity to the area of legal advice to his client."

I would remind those present that we are here at the direction of Congress to discharge an important legislative function. You in the hearing room are here by permission of this committee, and I know and am sure you will conduct yourselves as guests of this committee at all times. Any disturbance of any kind or audible comment during the course of the testimony, whether favorable or unfavorable to any witness, will not be tolerated."

Q. Mr. Arens, next follows the testimony of Mr. Silber on August 2, 1957, is that correct? A. Beginning on page 5, yes, sir.

Q. Mr. Arens, would you turn to your copy of Part P, please, sir, and to the table of contents to answer some questions of mine? A. Yes, sir.

Q. After glancing at the table of contents will you answer this question? Were there other witnesses who testified on July 17, 18, and 19th and August 2, prior to Mr. Silber's testimony? A. Yes, sir.

Q. And in fact on August 2d when Mr. Silber testified were there two who testified ahead of him on that day? A. Yes, sir.

Q. Was Mr. Silber present at the time of the commencement of the hearing on the 2d of August 1957? A. Yes, sir.

Q. At which time was there a statement made by the chairman of the Committee of the subcommittee? Will you look at page 5 of the report we have been reading from and then answer my question? A. Yes, sir.

Q. There was a statement made on August 2, 1957? A. Yes, sir.

Q. In Washington? A. Yes, sir.

Q. At a public hearing? A. Yes, sir.

Q. Was Mr. Silber present at the time of the statement? A. Yes, sir.

Q. Would you continue to read then on page 5 of the report? A. "United States House of Representatives, Subcommittee of the Committee on Un-American Activities, Washington, D. C., Friday, August 2, 1957.

Public Hearing.

The subcommittee met, pursuant to notice at 10:05 a. m., in the caucus room, Old House Office Building, Washington, D. C. Mr. Clyde Doyle (chairman of the subcommittee) presiding.

Committee members present: Representatives Clyde Doyle, of California, James B. Frazier, Jr., of Tennessee, and Gordon H. Scherer of Ohio.

Staff members present: Richard Arens, director, and W. Jackson Jones and Louis J. Russell, investigators.

Mr. Doyle: The Committee will please come to order.

This morning's hearings are a continuation of previous hearings started on July 17, 1957, this being a continuation of a series of hearings in the communications industry in the United States, namely, the position and influence held by members of the Communist Party and organization dedicated to the Communist objectives in that field of communications industry, principally.

On July 10, 1957, at a regular meeting of the committee, with all members except two present and voting, a motion was made by Mr. Scherer and seconded by Mr. Frazier, which authorized the holding of these hearings in Washington, D. C., on this general subject.

The resolution adopted by the committee on July 10, 1957, was as follows:

"A motion was made by Mr. Scherer, seconded by Mr. Frazier, and unanimously carried, approving and authorizing the holding of hearings in Washington, beginning July 17, 1957, or at such later date as the chairman may determine, for the purpose of considering whether or not members of the Communist Party, or persons subject to its discipline are employed in various media of communications used in the transmission of vital communications, and the advisability, in the national defense and for internal security, of the adoption of remedial legislation authorizing the Defense Department and other Government agencies to adopt and enforce appropriate

regulations designed to protect and preserve inviolate secret and classified Government information and investing in appropriate Government agencies, power to preclude access to vital communication facilities in time of war or other national emergency, persons who probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage."

Before proceeding further, I would like to include in the record a copy of the order for appointment of this subcommittee, signed by the chairman on the 12th day of July 1957. In it, there is appointed a subcommittee consisting of Mr. Frazier of Tennessee, who is on my left, and Mr. Scherer of Ohio, who is on my right, and myself, Doyle of California, subcommittee chairman, to conduct these hearings in Washington, D. C., which began on July 17, 1957.

As this order authorized the subcommittee to conduct hearings on this general subject, beginning on July 17, 1957, let the record further reflect that this hearing is a continuation of those begun on that date.

* * * * * * * * * *

29 Witness: "Order for Appointment of Subcommittee.

"To the Clerk of the Committee on Un-American Activities of The House of Representatives:

"Pursuant to the provisions of law and the rules of this committee, I hereby appoint a subcommittee of the Committee on Un-American Activities, House of Representatives, consisting of Hon. Clyde Doyle, chairman, and Hon. James B. Frazier, Jr., and Hon. Gordon Scherer, associate members, to conduct hearings in Washington, D. C., beginning on July 17, 1957, on all matters within the jurisdiction of the committee, and to take testimony on said day or any succeeding days, and at such times and places as it may deem necessary, until its work is completed.

"The clerk of the committee is directed to immediately notify the appointees of their appointment and to file this order as an official committee record, in the order book kept for that purpose.

"Given under my hand this 12th day of July, 1957.

"(Signed) FRANCIS E. WALTER,

"Committee on Un-American Activities,
House of Representatives."

Mr. Doyle: Those of the subcommittee who are now present and constitute a quorum are, in fact, the full subcommittee that I have just identified.

Congress, by Public Law 601 of the 79th Congress, placed upon this committee the duty of investigating the extent, character, and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries, or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

Congress has also placed upon this committee the duty of exercising continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of this committee.

If these hearings, the second of a series on this general subject, the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications.

In the event that testimony given during these hearings reflects a situation correctable by legislation or which may be remedied by legislation, the committee will recommend the appropriate measures at the proper time.

It is the purpose of the subcommittee in the conduct of these hearings to discharge the duties placed upon us by the Congress by calling witnesses who, we have reason to believe, possess information which will be of value to us and to the Congress in the consideration of such legislation.

It is a standing rule of this committee that any person named in the course of committee hearings, will be given an early opportunity, upon request, to appear before this committee if he so desires, for the purpose of denying or explaining any testimony given adversely affecting such person. In the event that there are such person, they should immediately communicate with any member of the committee staff and make their requests known.

In every hearing, the committee has encouraged witnesses to have legal counsel with them, if they so desire, and it has always welcomed the presence of legal counsel. In fact, the rules of the committee, which are well known and have been publicly distributed and widely distributed, provide that "at every hearing, public or executive, every witness shall be accorded the privilege of having counsel of his own choosing.

"The participation of counsel during the course of any hearing and while the witness is testifying shall be limited to advising said witness as to his legal rights. Counsel shall not be permitted to engage in oral argument with the committee, but shall confine his activity to the area of legal advice to his client.

"I would respectfully remind those present that we are here at the direction of Congress to discharge an important legislative function. Those in the hearing room are here by permission of the committee, and I trust and I know that you will all conduct yourselves as guests of the committee and of the Congress at all times.

A disturbance of any kind, or audible comment during the course of testimony, whether favorable or unfavorable to any witness, will not be tolerated."

Mr. Hitz: Excuse me just a moment.

By Mr. Hitz:

Q. Mr. Arens, have you examined the Government Print which is Part I of these hearings this morning? A. Yes, sir.

Q. And are you able to answer this question? Do the asterisks noted on page 7 which you have just passed over in reading, do they denote the testimony of two witnesses who appeared prior to Mr. Silber on this 2d day of August by the names of Stallone and Chew? A. Yes, sir.

Q. Now will you continue to read without omission? A. "Mr. Arens: The next witness, if you please, will be Mr. Bernard Silber.

Kindly come forward, Mr. Silber, and remain standing while the chairman administers the oath to you.

Mr. Doyle: Mr. Silber, please raise your right hand.

Do you solemnly swear you will tell the truth, the
33 whole truth, and nothing but the truth, so help you God?

Mr. Silber: I do, sir.

Mr. Doyle: Please take the witness chair.

Testimony of Bernard Silber, Accompanied by Victor Rabinowitz, Counsel.

Mr. Arens: Kindly identify yourself by name, residence, and occupation.

Mr. Rabinowitz: All right. If we are going to have more pictures, let's get them over with before we start.

Mr. Silber: The question, please?

Mr. Arens: Kindly identify yourself by name, residence, and occupation.

Mr. Silber: My name is Bernard—B-e-r-n-a-r-d Silber, S-i-l-b-e-r, residence 504 Grand Street, New York.

Mr. Arens: And your occupation?

Mr. Silber: Service writer for Western Union Telegraph.

Mr. Arens: You are appearing today, Mr. Silber, in response to a subpena which was served upon you by the House Committee on Un-American Activities?

Mr. Silber: That is correct.

Mr. Arens: And you are represented by counsel?

Mr. Silber: That is correct.

Mr. Arens: Counsel, kindly identify yourself.

Mr. Rabinowitz: Victor Rabinowitz.

Mr. Arens: How long have you been engaged as a service writer?

34 Mr. Silber: Forty-one years.

Mr. Arens: And have you been engaged as a service writer all that time at Western Union?

Mr. Silber: That is correct.

Mr. Arens: Did you have any other job at Western Union besides service writer?

Mr. Silber: I think for 2 years I was a service clerk, which is just before you become a service writer.

Mr. Arens: Give us just a thumbnail sketch, Mr. Silber, if you please, of your duties as a service writer?

Mr. Silber: Messages—I will put it this way: We handle messages after they have been transmitted, and they are referred to our department for certain types of handling, messages, undelivered. We report and handle complaints from senders regarding deliveries, nondeliveries, immediate service, messages that come in bearing wrong checks, or what—wrong number of words. We manage to get the record for purposes of charging properly and so forth.

Mr. Arens: Have you or have you not access to confidential or restricted messages of any kind of the Government of the United States?

Mr. Silber: Government messages are handled in the usual course of events.

Mr. Arens: Just answer the question, please, sir. Do you have access to Government messages?

35 Mr. Silber: In my line of work I would say "Yes."

Mr. Arens: Do you have access to Government security messages, coded messages of any kind?

Mr. Silber: Coded messages; yes. We have no way of telling whether they are security messages or not.

Mr. Arens: You have access to Government coded messages; is that correct?

Mr. Silber: That is correct.

Mr. Arens: Have you now or have you ever been a member of the Communist Party?

Mr. Silber: I must answer that in two ways. I am not a member of the Communist Party; I was a member of the Communist Party.

Mr. Arens: When were you a member of the Communist Party?

Mr. Silber: Well, if I may answer my way, I was a member for a brief period. Oh, from approximately 1948. I almost immediately drifted away. I wasn't too much interested. I was never active. I probably attended meetings for a year or so and then very rarely, and then, within a few years, I was just out.

Mr. Arens: What cell did you belong to, Mr. Silber, at that time?

(The witness conferred with his counsel.)

Mr. Silber: Just what do you mean by "cell"?

Mr. Arens: What group of the Communist Party were you a member of?

36 (The witness conferred with his counsel.)

Mr. Silber: I must decline to answer that, sir.

Mr. Arens: Why?

Mr. Silber: On the basis—I have a short statement prepared, if I may—I must decline to answer on the grounds set forth in the decision of the Supreme Court in the Watkins and Sweezy cases, and the statement filed with the committee by Mr. Grumman on July 18, including (1) the lack of jurisdiction of the committee; (2) my rights under the first amendment; (3) the vagueness of the resolution setting up this committee; and (4) the lack of pertinency of this committee.

Mr. Doyle: May I inquire?

Mr. Silber: Yes.

Mr. Doyle: Of course, you didn't prepare that yourself. Your legal counsel—

Mr. Silber: It was prepared in conjunction with counsel.

Mr. Doyle: Yes.

You have been in the hearing room all morning?

Mr. Silber: Yes.

Mr. Doyle: And you heard me state to the last witness that we could not accept—and made it clear to him, I am sure, that we would not accept his reference and stated reliance upon a brief filed by someone else or offered by some other witness on July 17 or 18 before this committee?

Mr. Silber: Yes.

37 Mr. Doyle: I want to make it clear to you, therefore, regardless of what your own legal counsel advised you, this committee does not rely in any way upon your reference to the brief of the gentleman on July 17 or 18, as a valid ground of objecting to answer the questions. Is that clear to you?

(The witness conferred with his counsel.)

Mr. Silber: All right.

Mr. Doyle: All right.

Mr. Arens: Before we proceed, if you are—

Mr. Scherer: Just a minute, Mr. Arens.

Mr. Arens: I beg your pardon.

Mr. Scherer: You refused to answer Mr. Arens' question as to the person who recruited you in the Communist Party. You refused to identify that person.

Now, without identifying him or telling us his name, is that person still a member of the Communist Party today?

(The witness confers with his counsel.)

Mr. Silber: I have no knowledge of such.

Mr. Scherer: Is he still associated in the same type of work you are associated in?

(The witness confers with his counsel.)

Mr. Scherer: As a communications worker?

Mr. Silber: To the best of my knowledge he is no longer in the industry.

Mr. Scherer: Was he a communications worker?"

38 "Mr. Hitz: Just a moment, please. That is count one, Your Honor. Was he a communications worker?

"Mr. Silber: I must decline to answer that on the same grounds.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline.

Mr. Doyle: I didn't hear you.

Mr. Silber: I must still decline.

Mr. Arens: Mr. Chairman, I respectfully suggest that I be permitted to explain to the witness why it is pertinent to this inquiry for us to insist that this witness tell us whether or not the person who recruited him into the Communist Party was at that time in the communications field as a communications worker.

Now, Mr. Witness, this committee is considering legislation to safeguard this Nation from possible espionage or sabotage facilities by Communists.

If the person who enlisted you into the Communist Party was engaged in the communications field, that person undoubtedly would have some information which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country.

Therefore, I respectfully suggest now, Mr. Chair-

39 man, that this witness be ordered and directed to tell the committee whether or not the person who recruited him into the Communist Party was, to his knowledge, engaged in the communications industry.

(The witness conferred with counsel.)

Mr. Doyle: Go ahead, continue your counsel with the witness.

Mr. Rabinowitz: I understand that counsel asked for a direction.

Mr. Arens: That is correct.

Mr. Doyle: I will make the direction when you are through counseling the witness.

Mr. Rabinowitz: I suggest, Mr. Chairman, you make the direction first. If you do not make your direction, I will not have to counsel the witness.

Mr. Doyle: I want to say to the witness before I make the direction: You were in the hearing room all this morning, Witness?

Mr. Silber: That is correct.

Mr. Doyle: And you heard me reading my opening statement; did you not?

Mr. Silber: I believe I did, yes.

Mr. Doyle: You believe you did. Now, I direct you to answer counsel's question. I direct you to answer that last question. He has explained to you the pertinency, and my opening statement explained the pertinency of this investigation.

Mr. Arens: And so that there can be no question on this record, the question presently asked and outstanding is for you to please tell the committee whether or not the person who recruited you into the Communist Party was himself engaged in the communications industry.

(The witness conferred with his counsel.)

Mr. Silber: May I have a short recess, please, for a few moments?

Mr. Rabinowitz: May we have a moment or two to consult on this?

Mr. Doyle: Yes; go ahead and take it.

(At this point a short recess was taken, after which the hearing was resumed.)

Mr. Doyle: The committee will please come to order again, after a few minutes' recess, and the record will show that all three persons who are members of the subcommittee are personally present.

Proceed, Mr. Arens.

Mr. Arens: There is a question outstanding on the record and the witness wanted to confer with counsel, and I take it he has conferred and he is now ready to give his response to the question.

Mr. Silber: After consultation with counsel, I decided I must answer that on the grounds, on the reasons stated previously, in addition I wish to add the question—

41 Mr. Doyle: Well, previously stated in the statement you read?

Mr. Silber: That is right.

Mr. Doyle: That will be sufficient.

Mr. Silber: Including the matter of personal conscience which prevents me from doing things that I am not sure of, and also on the grounds that I don't see what this question has to do with the question propaganda which this committee is concerned with.

Mr. Arens: Mr. Chairman, when you said that would be sufficient, I take it you wanted the record to reflect his reasons are sufficiently set forth in the record but that this committee does not accept his reasons and directs him and orders him to give a response.

Mr. Doyle: That is correct.

We are not accepting the reasons; we are merely stating that the reference to the same statement you said was prepared with the assistance of counsel, and which you previously read will be sufficient for you to refer to that as reasons why you refuse to answer this instead of taking the time to reread it.

Mr. Silber: That is right.

Mr. Arens: Mr. Witness, I want to make a statement to you.

On the basis of extensive staff investigation it is the judgment of the staff that there is now in the establishment in which you are engaged at least one cell of the Communist Party operating.

42 We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists.

Mr. Silber: I think I must decline to answer that question on the grounds stated."

"Mr. Hitz: Excuse me for a moment. Your Honor that is count two.

Mr. Rabinowitz: Your Honor that is the count that was dismissed.

The Court: I understand that."

(Witness continuing:)

Mr. Arens: I say to you that the pertinency of that question is this:

If you do have such information and if we can get the names of those people and if we can get them to testify, we, will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation.

I, therefore, Mr. Chairman, respectfully suggest now that the witness be ordered and directed to answer the question which is outstanding on this record.

Mr. Doyle: I make that direction.

Counsel now for the second time has explained the pertinency of the other question, and that same explanation plus this explanation as to pertinency applies.

43 (The witness confers with his counsel.)

Mr. Silber: The fact is, having been out of the party—

Mr. Scherer: I didn't hear that.

Mr. Silber: Having been out of the group so long I have no knowledge of anyone at this time of the people—no knowledge of anyone being a member, who was a member of that group, being a member of that group today. I can't—

Mr. Arens: You know that isn't the question I asked you. Let us get the record clear.

Mr. Rabinowitz: Let's give the reason for the question.

Mr. Arens: Counsel, you know your sole and exclusive prerogative is to advise your client as to his legal rights.

You know what the question is, and you understand it. If you do not understand it, say, "I don't understand it."

The question is: Do you, Mr. Witness, know people who are presently engaged in Western Union in the communications facilities who at any time have been known by you to be Communists?

(The witness conferred with his counsel.)

Mr. Silber: I must decline to answer that for the same reasons.

Mr. Arens: Now, Mr. Witness, let the record carry forth the same explanation that I gave to you a few moments ago as to why I regard this question as pertinent.

And I respectfully suggest, Mr. Chairmann, that
44 the record now reflect an order and direction of the witness to answer the question.

Mr. Doyle: I direct you to answer the question, Witness. We do not feel that your answer is sufficient and cannot accept it here.

Mr. Silber: I must still decline. I am sorry.

Mr. Scherer: As I understand it, in refusing and in declining to answer this last question and the previous question, you are not refusing to do so on the basis of the fifth amendment?

Mr. Silber: That is correct.

Mr. Scherer: All right.

Mr. Rabinowitz: May I address the Chair just for a moment on this? There is a legal issue involved?

Mr. Doyle: No. We are not settling issues here. This is not a court.

Mr. Rabinowitz: I would like to clarify the reference to the fifth amendment. There are many parts of the fifth amendment.

Mr. Doyle: You clarify it with your witness, not with us.

(Counsel conferred with the witness.)

Mr. Silber: I am stating I am not relying on the self-incriminating clause of the fifth amendment.

Mr. Doyle: Judge Frazier? Have you any questions?

Mr. Frazier: I have no questions.

45 Mr. Doyle: Have you any further questions, Mr. Scherer?

Mr. Scherer: I have no further questions.

Mr. Doyle: May I ask this, Witness:

When you first began to answer questions here, you volunteered the statement, in answer to the question, that you had been a Communist.

Mr. Silber: That is correct.

Mr. Doyle: Do you remember doing that?

Mr. Silber: That is correct.

Mr. Doyle: All right.

Now, why did you do that?

Mr. Silber: I probably was interested. It is hard to explain, probably for theoretical grounds or some other grounds.

Mr. Doyle: Why did you withdraw from the Communist Party?

Mr. Silber: I lost—

Mr. Doyle: After being in it a few years, as you testified?

Mr. Silber: It wasn't a few years, sir; it was relatively short. I lost interest in it. I found I wasn't interested enough to do anything about it.

Mr. Doyle: Why weren't you interested in the Communist Party group that you were in? What did you find about it that didn't keep your interest?

Mr. Silber: Well, it simply didn't. I had other interests probably, that kept me more occupied. I didn't think sufficiently of it to keep me there.

46 Mr. Doyle: You attended meetings quite frequently.

Mr. Silber: Not frequently, sir. I might say frankly, after a very short time I attended the meetings infrequently. In other words, it was just a complete drifting away and it took such a time.

Mr. Doyle: What caused you to drift away.

Mr. Silber: I stated I was no longer interested in it. I don't believe that I was politically conscious in the first place; it wasn't interesting, and I just drifted away. I never formed too many opinions on it, and that was it.

Mr. Scherer: What union do you belong to?

Mr. Silber: The American Communication Association.

Mr. Scherer: Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?

Mr. Silber: I must decline to answer that, sir."

"Mr. Hitz: Excuse me, sir. This is count three, Your Honor.

(Witness continuing:) "Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline on all the grounds previously stated.

Mr. Scherer: Were any of the present officers of your union members of the Communist Party at the time
47 you were in the party?

Mr. Hitz: Excuse me, sir. Your Honor that is count four.

(Witness continuing:) Mr. Silber: I must decline for the same reasons. I must decline to answer.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline to answer.

Mr. Scherer: And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced.

Mr. Doyle: May I inquire for one question?

Mr. Silber: Yes, sir.

Mr. Doyle: Have you any suggestions to this committee, and therefore, Your Congress, in the field of legislation, anything you think or suggest that we might consider legislation which would protect the security of this Nation against any subversive activities, sabotage, or interference with Government messages, either in time of war or peace?

Mr. Silber: Frankly, I don't consider myself qualified to offer any suggestions along technical lines or things of that sort. I really don't consider myself qualified in offering any suggestion.

48 Mr. Doyle: I want to compliment you in getting out of the Communist group when you did. I also hope the time will come before long when you will feel it is also your duty and your obligation to yourself and family and your Nation to come to Congress and help us understand the Communist Party as you understood it when you got out of it. You got out of it, although you have not given us the full reasons here today, I don't feel, you got out of it for some other reasons. You were dissatisfied with it. It had no attraction for you.

Now, why didn't it? I do not think you have given us the full answer, and I wish you would come to the point where you can help us.

Try to do that, will you?

Mr. Silber: I am sorry.

Mr. Doyle: You needn't be sorry. I have given you an invitation.

Mr. Silber: I have given you the best answer that I could under the circumstances. I have a conscience to protect, and other things. I am sorry.

Mr. Doyle: The witness is excused, and counsel.

The committee today is continued to Friday, August 9, at 10 a. m. in this room.

(Whereupon, at 12:15 p.m., Friday, August 2, 1957, the subcommittee recessed to August 9, 1957, at 10 a. m.)"

By Mr. Hitz:

49 Q. Now Mr. Arens, at the bottom of page 15 under the heading Other Pertinent Committee Proceedings, is there reproduced a resolution of this Un-American Activities Committee authorizing it to act through subcommittees of three or more members of the Committee? A. Yes, sir.

Q. And on page 16, is there reproduced a resolution of the subcommittee on August 21, 1957, citing to the full Committee the facts of the refusals of Mr. Silber to answer? A. Yes, sir.

Q. And at the bottom of the page a similar resolution by the full Committee reporting these facts to the full body of the House? A. Yes, sir.

Q. On the same day? A. Yes, sir.

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50 The Court: We will take a short recess.

(The Court recessed at 11:25 and reconvened at 11:35 after which the following occurred in open court:)

Mr. Hitz: Your Honor, I think I do have one question that I would like to ask before turning Mr. Arens over for cross-examination.

The Court: All right.

51 By Mr. Hitz:

Q. Do you see Mr. Bernard Silber, the witness concerning whom you read here today? A. Yes, sir.

Q. If he doesn't stand, will you point him out? A. Yes, sir, he is seated—he just stood.

Q. And for the record that is the defendant, Mr. Silber? A. Yes, sir.

Mr. Rabinowitz: I don't think there is any issue here of identification.

Mr. Hitz: All right. You may cross-examine.

Cross-examination

By Mr. Rabinowitz:

Q. Mr. Arens, you said you had been a staff director of the House Un-American Activities Committee since 1956. Is that correct? A. Yes, sir.

Q. And prior to that what did you say your position was? A. Prior to that I had a position as staff director of the Senate Internal Security Subcommittee. Also staff director of the Senate Immigration Subcommittee. And I didn't mention this, but it is a fact that I was part of that time on the professional staff of the Committee on Judiciary of the Senate.

Q. Well, were these positions as staff director of the Senate Committee on internal security on the Senate
52 Committee on Immigration and on the staff of the Judiciary Committee both at the same time or at different times? A. Some of them overlapped.

Q. Well, now, can you give us the dates? A. Yes, I started with the Committee on Judiciary of The United States Senate early in 1947. I believe February of 1947. Shortly thereafter while maintaining my status as a member of the professsional staff of the Senate Committee on Judiciary, I was appointed staff director of the Immigration Subcommittee. Thereafter, I was appointed staff director of the Senate internal security subcommittee.

Q. When was that appointment? A. It was when the internal subcommittee was established. It was established shortly after the passage of the Internal Security Act of 1950. I would say it was in November of 50 or December 1950. I continued then to maintain my status as staff director of the Immigration Subcommittee and also staff director of the Internal Security Subcommittee until—I can't be held too specifically on this—until about 1955 at which time I devoted my time, full time for a period to the immmigration—there was one time I had to drop out of Internal Security for a period. We were working on the Immigration International Act for a period of some three

months. And then we resumed the dual status and then I dropped the Immigration Subcommittee and con-
53 tinued on at that time as special counsel to the Internal Security Subcommittee until I left the Senate side to go with the Committee on Un-American Activities.

Q. And since 1956 you have been full time with the Committee on Un-American Activities of the House? Is that right. A. Yes, sir.

Q. You stated while you were a staff director of the Committee on the Internal Security you participated in the investigation of the communications industry? A. Yes, sir.

Q. Were hearings held by the Senate Committee at that time? A. Yes, sir.

Q. Do you remember about when those hearings were held? A. I believe there were two series, if my memory serves me correctly, there was a series of hearings we ran in 1951, and which we were conducting an investigation specifically on the American Communications Association and its activities.

Thereafter in about 1954, we had hearings on a Bill which was then pending called the Defense Facilities Protection Act, a Bill by Senator Butler of Maryland which was designed to cope with the situation we thought we had revealed in the 51 hearings. At that time we again got into the communications investigation.

Q. Did the 51 hearings result in a report by the
54 Senate Committee or do you recall? A. It depends on what you mean by a report. They did have, I believe, a synopsis of some kind and at that time I was not working on the Annual Report so I couldn't say whether it was in the Annual Report of 51 or not.

Q. The testimony taken in the hearings was published, wasn't it? A. Yes, sir.

Q. And was the same thing true in 1954? A. Yes, sir. When you say the same true, the hearings were published, yes, sir.

Q. And did the Committee issue a report with respect to those 1954 hearings? A. Well there again my memory doesn't serve me with sufficient clarity that I can come out and say. I don't recall at the moment.

Q. Then in 1956 you say you came over to the House side? A. That is correct, the spring of 1956.

Q. When did you first take up with the House Committee the question of an investigation into the communications industry? A. Shortly after I came to the House Committee.

Q. About when would that have been? A. I came to the House Committee in April or May of 1956. I came over on a temporary basis to fill out, to help out on a situation and they asked me to stay on. I would say
55 after I was there a few months. Among the first projects which I was suggesting to the Committee was this communications deal.

Q. Did you present a written memorandum to the Committee on the subject? A. No, sir.

Q. Was it presented to the Committee orally? A. Yes, sir.

Q. Was that at a regular meeting of the Committee? A. A series of meeting. I frequently talked about it to the Committee, yes, sir.

Q. Was action taken by the Committee during this period of time? A. Yes, sir.

Q. When was action first taken by the Committee? A. I couldn't say the specific date but shortly after I first began discussing the general situation with the Committee. I might be able to refresh my recollection. I observe here in the opening statement by Mr. Doyle that he said something to the effect, if I can refresh my recollection from this, in the opening statement at these instant hearings I recall seeing just this morning, Mr. Doyle, the subcommittee chairman, had said something to the effect that over the course of a year or so or a couple years or several months or something of that kind that the Committee had

been proceeding in this field. That is not the quota-
56 tion. I am just looking for it now. Here it is. It says the Committee has long been interested in the situation which exists in the communications industry in the United States. He does not specify a time when the Committee's interest was first created or first began to get into this field.

Q. Do you remember approximately when the Committee first took action on the subject? A. No, sir, I do not. If you would say approximately that gives me sufficient leaway, I would say within a matter of a few months after I was on the House side. The matter was discussed with the Committee at a series of meetings at which time the Committee told us to go ahead.

Q. Now, can you tell us what was the nature of the action that the Committee took? A. As I said a few minutes ago the Committee would listen to me explain the field which we proposed and discussed with them the leads we thought we had. And the Committee in conversation with me, not by a formal resolution passed which is similar to the one subsequently passed in this case but, but consensus opinion expressed in the Committee meetings would authorize and direct us to go ahead on this investigation and to proceed in the general lines that I would outline to the Committee.

Q. What did you tell the Committee was left unexplored by the investigation you had conducted in 1951 and
57 1954, if anything? A. I could not tell you with any degree of refinement what was said was left unexplored. I explained to the Committee that in my judgment this was a situation where the Committee's attention was needed—needed the Committee's investigation and that in the past although it had been given some attention by the Internal Security Subcommittee when I was on that side, as of the time I was with the House side no legislation had been developed, no strong recommendations that I can recall now had been specifically been embodied in law that

had been passed; that there were certain ramifications of this field which had not been thoroughly explored.

Q. What were those ramifications? A. As I said I cannot say at this instant here 1960 precisely what the ramifications were which I explained to the Committee at that time. I do know I had in my mind and I had tried to portray to the Committee my conviction that this was a field which needed further exploration and needed investigation looking toward the possible legislation or at least looking toward a surveillance over the administration and operation of the Communist Control Act of 1954.

Q. Actually, legislation had been developed on this subject in the Senate, hadn't it? A. Yes, sir. I participated in the actual development of that legislation which was not enacted. That is correct, yes, sir. You see
58 since the Senate hearings or at least approximately at that time, I believe it was probably at the same hearings, there was enacted the Communist Control Act of 1954, which precludes the National Labor Relations Board from certifying as a bargaining agent under the National Labor Relations Act, as a Communist infiltrated labor organization and as of the time that the Committee on Un-American Activities instituted its investigation—I am confident of this—neither the American Communications organization nor any other labor organization had gone through the processes necessary for determination that it was Communist infiltrated, notwithstanding the fact the sworn testimony was clear that a number of the key people in that Communications Association, officers, key people in it, were identified as members of what we commonly allude to as the Communist Party.

Q. And that sworn testimony had been developed in 1951 and 1954, hadn't it? A. Yes, sir.

Q. So one of the purposes of the investigation that the House Committee undertook in 1957 was to develop further what you conceived to be evidence that the American

Communications Association was a Communist infiltrated organization?

The Court: Was that a question?

Mr. Rabinowitz: Would you read it back?

(The reporter read the question).

A. Yes, sir.

59 Q. In the course of this investigation did you call any of the members of the National Labor Relations Board or of the Subversive Activities Control Board and question them concerning their administration of the laws? A. No, sir, I did not.

Q. Now when the Committee directed you to proceed with your investigation, which I take it would be some time you said the latter part of 1956, would that be a fair estimate of the time? A. Yes, I think that would be a fair estimate but I certainly wouldn't want to be held to a specific time.

Q. What did you, as staff director, do in response to that direction given to you by the Committee? A. I assigned two investigators to work on the subject matter. One was W. Jackson Jones, who is no longer with the Committee and the other is Louis Russell.

Q. And did they in fact report to you from time to time as to the results of their investigation? A. Yes, sir, not only reporting those results but I participated with them in directing what actually should be done and the like.

Q. Did they submit any written reports to you? A. If they did I don't have any specific recollection of the reports. We were working together in oral conversation most of the time. I want to make it clear, sir, that

60 I am not in any sense hedging on that. In anaticipation of a witness appearing the investigator who worked on it prepared memorandums from which I interrogated the witness but those are not memoranda that developed as between the investigators and myself in the process of the investigation. That is what I am trying to say.

Q. You stated that the—I will withdraw that. Did there come a time when you requested the chairman of the Committee Congressman Walter, for authorization to issue a subpoena for Mr. Silber? A. Yes, sir.

Q. Did you tell him what the purpose of the investigation was? A. Do you mean the conversation that I had with him?

Q. Yes? A. Of course not, he knew. He had been in the sessions continuously. Any more than I would tell you now having made this explanation within the past several minutes.

Q. Do you mean he was so familiar with Mr. Silber's name, when you said you wanted to subpoena Mr. Silber, that he said sure, and it wasn't necessary— A. No, I do not mean that at all, Mr. Rabinowitz. I am in almost daily conversation with the Committee, the chairman of the Committee. He knows intimately the investigations that are in process as I do and we are almost daily talking about the various investigations and the like and
61 cover the points and in any investigation a determination of an authorization of a subpoena, he knows just about as well as I do, at least in general terms, what we are doing and what the investigation is about.

I mean I didn't walk up to him in the hall one day and say, Mr. Walter. I am trying, we are having—I am not trying to be ludicrous here, and explain to him what I am trying to explain to you, the purpose of the investigation, because he knew. I had made it clear to him. At least I was convinced in my own mind from what he had said that he was aware of the Silber subpoena as well as other subpoenas were to be in connection with the investigation and in general what we expected to develop, yes, sir.

Q. Did he specifically authorize a subpoena for Mr. Silber or did he just authorize the issuance of subpoenas in general? A. The only answer I can give you to that is that I don't recall. I do know that in this case as in all cases, in all investigations that I am in conversation with

him and I will say, we have three witnesses who are engaged in this type of thing and we want to subpoena for next Tuesday and he will come back and say, be careful now we don't get too many people for this day because we have a heavy session on in the House, and in conversation back and forth, he will say: you are going to repeat information of the witnesses and be careful
62 and don't do that. He will ask me some questions about them at times.

I want to be absolutely frank that I do not recall at this time of taking a file in his office specifically with reference to Mr. Silber or repeating to him what we expect to show in this particular case as such.

Q. Did you have a file on Mr. Silber at the time you requested that he issue a subpoena? A. I don't presently recall but I have no doubt we did have, yes.

Q. And what would be in that file?

Mr. Hitz: Objection, irrelevant and immaterial.

The Court: Objection sustained.

Q. That file would contain written material, I assume?

Mr. Hitz: Object.

The Court: Objection sustained.

Q. In any event you took this file or you might have taken this file and shown it to Congressman Walter or you might not have taken the file. A. I would say the probabilities are that I did not. But I do not recall in this particular case. My guess in this series of hearings we had, the record would reflect at least a dozen and half witnesses.

Q. Did you ask him for subpoenas for these
63 witnesses all at the same time? A. I could not recall because I just don't know.

Q. In any event, one thing is sure it was several weeks before the Committee authorized the hearing? That is true is it not? A. Say that again.

Q. In any event—

The Court: Let the record show the subpoena was issued June 21st.

The Witness: Yes, sir.

The Court: And it also shows Congressman Walter signed the subpoena as chairman.

The Witness: Yes, sir.

The Court: And the resolution was dated some time later.

The Witness: July 10, precisely, that is what I am directing myself to.

By Mr. Rabinowitz:

Q. It is clear, is it not, that the subpoena was issued several weeks before the hearing was authorized? A. Depending upon what you mean by the hearing authorized. I have explained Mr. Rabinowitz that the hearings, the investigations, the whole procedure was authorized and directed by the Committee in the course of repeated sessions and that if you will let me finish my answer, please. And

64 in accordance with the practice of the Committee before the actual hearing is held the counsel of the Committee, Mr. Tavenner, prepares a formal resolution which is read into the record of the hearing. I could not in any sense confirm your observation or characterization and the authorization being exclusively coexistent with the piece of paper which was prepared by Mr. Tavenner and submitted to the Committee.

Q. Now is it your testimony then that some time prior to the issuance of the subpoena the Committee did in fact, take action authorizing the holding of a hearing? A. Yes, I have repeatedly said that here today.

Q. You are familiar with the House Rules, aren't you? A. Well that would be quite an order, to be familiar with all of them. I wouldn't want to assess that knowledge against myself.

Q. Let me call your attention to Rule 11, subdivision 26B, which I will read. A. Well you read it.

Q. Each Committee shall keep a complete record of all Committee action. Such record shall include a record of

the votes on any question on which a record vote is demanded. Now— A. May I see it now, Mr. Rabinowitz?

Q. Surely. A. Yes, sir, such record shall include a record of the votes on any question on which a record vote is demanded, yes, sir. We do that. If a demand
65 is made for a record vote we go in and take a poll of the Committee.

Q. Now prior to July 10, is there any record of any Committee action authorizing either this investigation or the hearing? A. Depending upon what you mean by Committee record, Mr. Rabinowitz. If you mean a formal resolution I am sure it is not.

Q. I mean anything in the minutes of the Committee? The Committee does keep minutes doesn't it? A. The Committee keeps minutes, yes, sir.

Q. Is there anything in the minutes of the Committee? A. I don't know whether or not I should go into anything of the minutes. We regard those minutes of the Committee in toto as containing security information and I am under mandate of this Committee not under any circumstances, to reveal the contents of the Committee files or the records which the Committee characterizes or classifies in our relationship of the staff with the Committee as security information and I will not do so.

Q. Would you consider a resolution authorizing an investigation to take place or authorizing the holding of a hearing, to be a resolution that involves security information? A. I would not consider a resolution as such, no, sir, under normal circumstances.

Q. As a matter of fact, counsel for the United States in the course of his examination of you did refer
66 to and read into the record a number of Committee resolutions? A. Of course, of course, yes, sir.

Q. Now let me ask you again, do you know whether the minutes of the Committee contained any record of any action taken by the Committee with respect to this investigation prior to July 10, 1957? A. Personally I don't

know. To be honest with you, I don't know. I would personally doubt it because the minutes of the executive sessions of the Committee in general with the exception of the recitation of certain things, which I do not discuss, contain only formal resolutions which are passed in the nature of the resolutions that we have here in this proceeding today revealed.

The Committee minutes would reveal other items which I would prefer not to discuss.

Q. Mr. Arnes, you testified in response to a question by Mr. Hitz that prior to the issuance of the subpoena to Mr. Silber, you had information as to Silber's membership in the Communist Party. Do you recall that testimony? A. Yes, sir.

Q. What was that information? A. He had been a member of the Communist Party.

Q. What was the source of the information? A. The source of the information, at least the source of the information which I had was a conversation or
67 conversations with investigators who were working on the case.

Q. What was the content of that conversation? A. Well I just told you, mainly, that Mr. Silber had been a member of the Communist Party.

Q. And did he tell you where he got that information? A. I can't at the instant recall that I—based upon—based upon our pattern of activity I would say he got it from his investigating processes.

Q. Did he tell you who was the source of that information or what was the source of that information? A. If he did I don't recall. I would hazard a guess he did but I don't recall.

Q. Did he submit any memorandum to you on the subject? A. No, sir.

Q. Who was that investigator? A. It was—I would be almost confident it would either be Mr. Russell or Mr. Jackson—I mean Mr. Jackson Jones.

Q. You say Mr. Jones is no longer with the Committee? A. Mr. Jones is no longer with the Committee.

Q. Where is he? Do you know? A. He is in the State of Georgia and I believe practicing law.

Q. Is Mr. Russell still with the Committee? A. Yes, sir.

68 Q. When investigators go out on an investigation under your direction, don't they make it a practice to take statements from people whom they interview? A. They do on some occasions take notes, if they have what we loosely characterize as a friendly witness. If they are confronted with a hostile witness who won't speak, we don't make any notes.

Q. Did Mr. Jones or Mr. Russell, as the case may be, have any notes with respect to his reason for believing that Mr. Silber was a member of the Communist Party? A. I do not know whether he did or not. I wouldn't be at all surprised if they did.

Q. Are those notes kept in the files of the Committee? A. I would speculate they are there, yes, sir, if there are such notes.

Mr. Rabinowitz: May I request, Your Honor, that the files of the Committee with respect to Mr. Silber, be produced so we can ascertain—I am perfectly willing to submit it to the Court—ascertain whether in fact there is in the files of the Committee some written memorandum indicating the information in the possession of the Committee as to Mr. Silber's membership in the Communist Party.

Mr. Hitz: We oppose that asking, Your Honor, because it is not relevant or material to the testimony of this witness. This witness has stated that someone whom he

69 believes to be Jones, had told him orally without displaying any written material whatever, that someone had told him in the investigation that he had made previously that Silber had been a member of the Communist Party. Now whether or not there were notes in behind Jones' oral statement to Mr. Arens, is wholly immaterial and irrelevant to the testimony we have had here.

The testimony we have had here is more than a sufficient reason for Mr. Silber to have been called before the Committee, if any reason whatever is necessary and it is extremely doubtful if any reason is necessary to call Mr. Silber.

Mr. Rabinowitz: Your Honor, may I address myself to that?

The Court: Yes.

Mr. Rabinowitz: The issue raised here is one which goes to the probable cause for calling the witness Silber. Your Honor will recall that in the Barenblatt case, one of the last paragraphs, the Court said in discussing Barenblatt, nor did the petitioner's appearance as a witness follow from indiscriminate dragnet procedures lacking probable cause for belief that he possessed information which might be helpful to the subcommittee.

And then there is a footnote which refers to testimony that was given before the Committee with respect to the defendant Barenblatt's membership or alleged membership in the Communist Party, specifically as I recall it, testimony by other persons at other hearings that Barenblatt had been a member.

70 Now I note that Mr. Hitz says it is very doubtful as to whether probable cause need be shown. And Your Honor knows it is fairly universal practice by the Government that it does make an effort to show probable cause and I suspect that Mr. Hitz's doubt at this moment as to whether or not it has to be shown is caused by the fact he has great doubt as to whether he has shown it here or whether he can show it.

The fact is with respect to almost all cases that I can recall the witness, the defendant who is on trial, is a man who has at one time or another been identified as a member of the Communist Party, and therefore, the Committee may say and its contention has been upheld as it was in Barenblatt, that there was probable cause caused by the fact

that other people have identified him for believing he is a Communist.

In this case that is not so. Although we have had as counsel has testified, three rather extensive investigations into the American Communications Association, one of which was this one, which is the subject of this trial, in not one of them had any person ever identified Mr. Silber as having been a member of the Communist Party.

Now the Government, we contend, has to prove probable cause. I believe the Government conceded to that in the Hammon trial two weeks ago and it has been, as I said, a fairly universal practice for Government counsel to try to show that. And as a matter of fact a question put

71 to Mr. Arens, why did you call Silber? And Mr Arens said, we had information.

Now if that is relevant and I think it is highly relevant and in fact, a necessary part of the case. I have the right to cross-examine and I have a right to ascertain from this witness whether in fact there was probable cause for calling Mr. Silber or, whether on the contrary, this was a part of an indiscriminate dragnet procedure which the Supreme Court in Barenblatt mentions and which the Court obviously disapproved.

And, I propose to show that there was no probable cause. This was a guess. This was a stage. This was a dragnet procedure. And in fact, there was no information in the file of the Committee with respect to Mr. Silber, and there was no justification for issuing the subpoena to him at all.

Mr. Hitz: Your Honor, we do not concede that probable cause need be shown despite the dicta in the Barenblatt case. It is true we show it very frequently so as to not even raise that legal question. Here we have shown and we have shown almost enough for an arrest warrant to have been obtained that is from information that had been received from a staff employee under the supervision of this witness. And if I could ask him a question that would elicit the information that it was represented that this

informant who said Mr. Silber had been a member of the Communist Party, was a person known in the past to have given reliable information, that would have been
72 enough upon which to base either an arrest warrant or a search warrant.

In addition to that in the Marshal case, 176 Fed 2d, 473 in our Court of Appeals, the same question was raised on appeal and the record at the trial court showed that the reason why Mr. Marshal's organization was called or had records subpoenaed and individuals called before the same un-American Activities Committee was for the reason that in the previous—that on the floor of the House the chairman of the Committee on Un-American Activities for the previous session had made a speech in which it referred to the activities of Mr. Marshal's organization, and indicated that there were subversive elements in the organization.

The Court of Appeals in passing upon this precise point stated that speech on the floor of the House by a predecessor Committee chairman was sufficient cause to have called Mr. Marshal and the records. That falls far short of the testimony—

The Court: It does not hold there must be probable cause. It is merely a question of how much cause.

Mr. Hitz: No, it merely disposes of the point by saying that in the record we have it. It holds that it would be necessary but is not that strong. It is not as strong as the holding on that proposition. But we have shown it here. We have shown—

The Court: I understand that. But since you have
73 shown it does not the witness become subject to cross-examination on it?

Mr. Hitz: Oh, yes, indeed so. But not to the extent of producing the notes, if there were any, of the staff member. Even if Mr. Arens himself had made notes of someone who had told him that Mr. Silber was a member of the Communist Party, those notes kept by this witness would not

be subject to cross-examination by Mr. Rabinowitz. And the Jenks case and the Jenks Statute do not hold that.

In order for a requirement that the Government produce the notes in behind the testimony of a witness those notes must an acknowledgment by the person interviewed. That is a true statement. It is in the nature of a written statement acknowledged by the person who is making the statement and then the witness testifies on the stand that he has such a statement. That is subject to cross-examination and production but not where the witness on the stand is not the maker of the paper or statement or takes notes from it that are acknowledged.

Mr. Rabinowitz: Your Honor, this has nothing to do with the Jenks case as I understand it.

Mr. Hitz: It certainly does but you are going farther than the Jenks case.

Mr. Rabinowitz: I am relying here on what seems to me to be a very element rule of cross-examination. The wit-
ness has testified to certain facts. Counsel thought
74 they were important enough to put the question. The
witness answered the question. If counsel wants to strike the question and the answer from the record, then I am perfectly willing to withdraw my request here. But as long as the statement, namely—

Mr. Hitz: I can shorten this and will make that request.

The Court: Do you withdraw all testimony?

Mr. Hitz: Oh, no. He said if I wanted to request—

Mr. Rabinowitz: No, no, that the question you put and the answer that Mr. Arens gave on the record on direct examination be stricken then I am perfectly willing to abandon this line of cross-examination. As long as Mr. Hitz's question and Mr. Arens' answer remain on the record, I have a right to cross-examine. It may be that the witness has forgotten. It may be that the witness is confused this man Mr. Silber with somebody else. It may be that the witness is inaccurate. Whatever the facts

may be, I have a right by cross-examination to bring them out.

Now I am asking whether there is in the files of the Committee some kind of substantiation of the witness statement which was that the Committee had cause to believe—I don't know whether it was the Committee or Mr. Arens, had cause to believe that this man had information as to his membership in the Communist Party. I do not have to accept that. I want to challenge that statement, and I want to find out whether it is true. This is a
75 simple matter of cross-examination. The fact that this may be security information has nothing to do with this situation as Your Honor knows. The Andolsheck case and a long series of other cases gives under these circumstances the Government the option of proceeding with the indictment but not the option of withholding the information.

The Court: I think the defendant is entitled to the information. I will order that it be produced. if they have any notes to indicate the basis upon which they formed the opinion that the defendant was a member of the Communist Party, they can produce them. If they do not then they can say so.

Mr. Hitz: Might I ask the witness a couple questions which I think will give the evidentiary basis for the final objection that I want to make to this procedure. I do not think the evidence, according to the way Mr. Rabinowitz has stated his proposition, is sufficiently clear on it at the moment.

The Court: You may proceed.

Redirect Examination

By Mr. Hitz:

Q. Were you shown any notes or any written material to the effect that Mr. Silber had been a member of the Communist Party? A. No, sir.

Q. Was the information that you had to that effect
76 transmitted to you orally? A. Yes, sir.

Mr. Hitz: I think that is the end of it, Your Honor.

Mr. Rabinowitz: He said he had a file so let's see what is in the file as to whether the Committee had probable cause. Not whether he thought they had probable cause. That is not the issue.

Mr. Hitz: No, he was told there was the information. There is no rule of evidence to require this witness to produce documents which he had not seen when he said he received oral information.

The Court: I am still of the opinion that the request is proper and I will grant the motion of the defendant that it be produced.

By Mr. Hitz:

Q. Do you know whether there is any such written material to the effect that we have mentioned here, namely, that Mr. Silber had been a member of the Communist Party? A. No, I do not. As a matter of fact I only said I surmised it over a period of time or something to that effect.

Q. The ruling of the Court is that must be produced. A. I want to be sure that I understand the ruling of the Court, what the order is to be produced.

The Court: Anything which you may have in writing which would support the conclusion which you reached
77 that Mr. Silber was a member of the Communist Party at the time he was subpoenaed. Does that meet your request?

Mr. Rabinowitz: Well, I would request that the file on Mr. Silber be produced for Your Honor's perusal and if Your Honor finds written information in there going into this issue, then I think it ought to be produced for examination by counsel. If Your Honor finds no such thing and will make a statement on the record to that effect then that will be satisfactory.

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78 Mr. Hitz: Your Honor, I would like to record my opposition to the last asking. The first asking had to do with the production of any notes, whether they had been seen by Mr. Arens or not which contained the information that Mr. Silber had been a member of the Communist Party and the Court ruled that should be produced if it existed.

The second asking is for the entire file and I object to that.

79 The Court: I will sustain the objection. I will limit it to the question of any notes which he had before the subpoena.

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81 By Mr. Rabinowitz:

Q. Mr. Arens, does the Committee keep a separate file with respect to each one of the witnesses who are called before it? A. I assume that I am not violating a Committee mandate. We are under a Committee mandate staff-wise not to discuss our procedure beyond the general form and not to discuss the context of the file because we know the Communist Party is seeking this information.

Q. Will you answer the question? A. Ask the question again. I don't hesitate to ask to be sure I know what I am talking about here because this is a very delicate field I am put in.

Mr. Rabinowitz: Will the stenographer read the question.

(The reporter read the question.)

A. Yes, sir.

Q. Now isn't it a fact, Mr. Arens, that the only kind of information that goes into that file is information with respect to the Communist Party membership or Communist Party activities or other so-called subversive activity with respect to the witness? A. No, sir.

Q. Well what other kind of activity— A. I would not tell you under any circumstances. I would go to jail

82 first before I would tell you what is in those files.

Q. Do you have information in those files which goes beyond their so-called subversive activities? A. We have vital security information in there and we know that the Communist conspiracy is seeking by every device possible to lay their hands on. We know they would—

Q. Don't argue, Mr. Arens, the lawyers will argue the matter. A. I am not not arguing. I am just making a pronouncement of what we have in those files.

Q. Well, you are not making a pronouncement. I am asking you and you are refusing to make a pronouncement.

Now let me ask again, Mr. Arens, whether you have in the files which are kept with respect to each witness, any information other than relating to the Communist Party membership, or subversive activities? Let us make it a little broader. A. Yes, sir, yes, sir, yes, sir. For example on the file we would have on any man. We would have not only—and this is not all the information we have in the file. We would have not only information about his Communist Party membership; we would have information about his educational background, what he had been, what he had done for the conspiracy, and all.

Q. Well the information you would have in the file of a man is the kind of information that you would use

83 in determining whether to subpoena a witness. Is that right? A. Yes, sir, that is correct.

Mr. Rabinowitz: Now I renew my request that the entire file be produced because I do not know what could be in that file other than information that goes to this question of probable cause.

The Court: I will deny your motion.

Mr. Rabinowitz: All right, if Your Honor wishes to recess.

(Whereupon the Court recessed at 12:25 hours until 2:30 P. M.)

AFTER LUNCHEON RECESS

Open Court:

Mr. Hitz: Your Honor, I would like the indulgence of the Court to permit me to ask Your Honor to reconsider the ruling for the production of documents as we are well acquainted with on the record that you required the production of before the luncheon recess.

* * * * * * * * * * *

88 The Court: I do not think the Jenks Act applies to this situation. I think this witness has testified that the Committee had information causing them to believe that this defendant was a member of the Communist Party. I think that the defense counsel has a right to explore that by way of cross-examination, including inquiry as to what information the Committee did have on the subject.

I do not see any reason for changing my ruling at this time.

Mr. Hitz: Now, I wonder if I could ask a question or two bearing upon the compliance or lack of compliance with Your Honor's ruling?

The Court: Yes.

Redirect Examination

By Mr. Hitz:

Q. Mr Arens, did you examine the records of the Committee on Mr. Silber? A. Since the morning recess?

Q. Yes? A. Yes, sir, I did.

Q. And did you find it to consist of a file, so called? A. Yes, sir.

Q. Was there any documents in that file that re-
89 corded or yes, recorded any information with respect to whether or not Mr. Silber was alleged to have been a member of the Communist Party, which information in the file predated June 21, 1957?

Just answer there was or was not. A. There was.

Q. And Your Honor with that I would like then to ask the witness what is the status of your efforts to comply with the order of this Court? A. Shortly after I returned to my office and examined the file, I ascertained that the Chairman of the Committee, Congressman Walter was then presiding on the floor of the House.

I personally do not have floor privileges. By that I mean I do not have access to the floor. I called the floor and asked the page if he could get a message to the Congressman to see if he couldn't excuse himself to come to the telephone. The page came back, he is a young fellow, and he said, he reached the conclusion in his own mind, that he couldn't reach the Congressman. I waited a little while and contacted a man who does have floor privileges, that was about 2:00, and he went to the floor, he said he was coming on the floor, and he came back and got on the phone to me, and said the Sergeant of Arms had intercepted him enroute to the roster from which the Congressman was presiding because they were in the process then of making a number of rulings and wouldn't let him disturb him. By the time I concluded that conversation it
90 was five minutes after 2:00 and I thought I better be getting back down here so I put on my hat and coat and left the office and here I am.

To make a long story short, I have not actually contacted the Chairman, although I thought I made a reasonable effort to do so.

Q. And am I correct in stating that in order for you to comply with the order of the Court, you must obtain the permission of your superiors, that is the Committee, and also before he could supply the material under the order of the Court, is it not true, he would have to get the permission of the full body of the House? A. That is my understanding although I am not thoroughly versed in the rules of the House that before House records can be produced the permission of the House has to be granted.

However, if the decision of the Committee would be negative, namely, that they would not produce the records, then they would not, of course, go to the House to have the House reaffirm that.

Mr. Hitz: I see. Your Honor, I am still of mind and I wonder if you would correct me if I am wrong. The order of the Court goes only to what we have established to be, documentation in the record made by a person other than Mr. Arens, which contains information concerning Mr. Silber's alleged Communist Party membership prior to June 21, 1957?

91 The Court: That is correct.

Mr. Rein: Well, it isn't limited to information not made by Mr. Arens.

The Court: Well as I understand Mr. Arens he said he made no record himself. There are no records of his own in the Committee files.

Mr. Hitz: That is correct and the only document that exists is the one that I brought out just now.

The Court: That is right.

Mr. Hitz: And Your Honor's order has not gone beyond that to include all material in the file.

The Court: That is correct.

Mr. Rabinowitz: May we proceed now with cross-examination or are you still holding this matter in reserve?

The Court: Yes, you may proceed.

Cross-Examination

By Mr. Rabinowitz:

Q. You have testified Mr. Arens concerning the general practice of the Committee and your staff in preparing for an investigation such as the present one, and I think you said after consultations with the Committee, you directed that the investigators go out and carry on the investigation in the field. Am I right. A. That is substantially correct, yes, sir. A fair summary.

92 Q. And do these investigators report from time to time to you as to the status and results of their investigation? A. Yes, sir.

Q. And do you direct their work? You supervise them? A. Well, yes, everybody works under the direction of the Committee but as my title as staff director, I do relay to them at least in theory, the directions of the Committee. That is correct.

Q. Is it the practice of the investigators working under your general directions, to interview potential witnesses who are likely to be called by the Committee?

Mr. Hitz: I object to that. I think it is immaterial.

The Court: I will sustain the objection.

Mr. Rabinowitz: Well, Your Honor I wanted to go into the question of practice of the Committee really as a background to preliminaries to asking questions about this particular defendant.

The Court: You may ask him about this particular defendant.

Q. Did any of your investigators interview Mr. Silber before he was called? A. I am a little bit puzzled on how to answer that question. I know the answer to it, Mr. Rabinowitz. The difficulty I have is that since the noon recess I have read very carefully much of the files in this case and have now got information which de-

93 rived from the file—not from any recollection of my own—I don't know whether I ought to tell about what is in the files.

Mr. Hitz: Mr. Arens, the question is whether or not that was done in this case—there was an interview of this witness.

The Witness: I will have to go ahead further now, I guess. I have left the door partially open and say that I know—

Mr. Rabinowitz: The answer is yes or not, was this witness interviewed. Answer the question yes or no.

The Witness: I am going to give my answer in my own way, namely, yes, he was according to what I have seen there and have seen in the course of the last two hours in the files. Not based upon my own recollection of a conversation or being a participant in the interview.

By Mr. Rabinowitz:

Q. And who was it that interviewed?

Mr. Hitz: And again I object, Your Honor. I do not think the staff interview of this witness has anything at all to do with the materiality bearing on this question. I think it is the testimony that he gave.

* * * * * * * * * *

95 The Court: I will sustain the objection.

By Mr. Rabinowitz:

Q. Who is it on behalf of the Committee and the Committee staff who determines which witnesses will be called in a particular investigation? A. It is not me. It is not made by the staff as such. Your question assumes a state of facts not in being, namely, that the deter-
96 mination of who is to be called is not a staff function exclusively. The staff participates in that. The staff serves the Committee and that is its sole purpose for being, to serve the Committee.

Q. Does the staff make recommendations as to who should be called? A. By the staff you are talking about myself as staff director. I confer with the members of the staff and in constant consultation with the Committee chairman.

Q. Do you make any recommendations on who should be called? A. Yes, sir, on many matters, including this particular item.

Q. And did you recommend to the Committee that Mr. Silber be called? A. To the chairman.

Q. That was prior to the issuance of the subpoena you

referred to a little while ago? Your testimony I mean a little while ago? A. I am sorry but your voice dropped.

Q. Prior to the issuance of the subpoena that we discussed a little while ago before the noon recess? A. Yes, sir.

Q. And did your staff investigator interview other witnesses in connection with this investigation as well?

97 A. Did the staff interview witnesses in addition to Mr. Silber?

Q. Yes? A. Yes, I am quite certain they did.

Q. That included witnesses such as Mignón and Finsmith? A. I wouldn't say specifically because I do not know but I know they interviewed other witnesses, yes, sir. And they attempted to interview this witness.

Q. You say they attempted to interview this witness? A. Yes, they attempted to interview Mr. Silber, yes, sir, I know that.

Q. Does it sometimes happen the Committee calls executive sessions? A. I didn't understand.

Q. Does it sometimes happen that the Committee calls witnesses in executive sessions, I should say? A. I don't understand what you mean by does it sometimes happen. Yes, it does, in executive sessions, yes, sir.

Q. At which time witnesses are sometimes called? A. Yes, sir.

Q. And are you familiar with the House rule with respect to that? A. Well let me see which rule you are referring to.

Q. I am referring to Rule XI, subdivision 26M. Let me read that so the Court will also know what we are

98 talking about also. If the Committee determines that evidence or testimony at an investigated hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session. (2) Afford such person an opportunity voluntarily to appear as a witness; and (3) Receive and dispose of requests from such person to subpoena additional witnesses.

You are familiar with that rule? A. Let me see that again. I want to be sure that I follow the context of it. Yes, the Committee follows that practice incorporated in this rule in a number of instances where we have the Committee makes a determination that the facts as suggested in the Rule would be applicable in that particular case.

Q. Did you consider-- A. Of course, it is based upon the concept which the Committee has and we are not exposing for the sake of exposure.

Q. Did the Committee consider calling this witness in executive session because the information in its possession indicated that an open hearing might tend to defame, degrade, or incriminate him?

Mr. Hitz: Please don't answer. I object because it is immaterial.

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99 The Court: I will sustain the objection.

By Mr. Rabinowitz:

Q. In any event Mr. Silber was not called in executive session? A. No, because the Committee did not determine the elements applicable to the Rule to be applicable in his case.

Q. When you say the Committee did not determine? A. It did not determine that the elements applicable in the Rule would apply to Mr. Silber.

Q. You mean it didn't consider the question? A.
100 It didn't make that determination.

Q. Didn't it consider it either way? A. In the language of the Rule it did not make that determination.

Q. Well did it make a determination that it would not incriminate him? A. No it doesn't attempt to make determinations as to which it doesn't have any obligation to make or reason to make.

Q. It made no determination at all on the subject? A. No, there was no determination made by the Committee

that in this particular case the elements specified in the Rule would be applicable to Mr. Silber.

Q. Did the Committee consider this question at all?

Mr. Hitz: I object.

The Court: The objection sustained.

Q. After the testimony of Mr. Silber did you prepare any report for the Committee in connection with his testimony, any written report, I mean?

Mr. Hitz: I am sorry. Will you read the question to me?

(The reporter read the question.)

Mr. Hitz: I object, Your Honor.

The Court: The objection sustained.

Q. Did you at any time after Mr. Silber testified prepare any written reports either for the Committee or for
101 The United States Attorney in connection with this case? A. Do you mean did I do it personally?

Q. Yes? A. No, I did not personally, no, sir.

Q. Did you direct anyone? A. With the possible qualification in the front of the testimony in each volume we issue, we have a synopsis of the testimony and I may have participated in the preparation of the synopsis, I couldn't say. That is and in the Annual Report we had as evidence of this case here today, we had alluded to the Communist penetration of the Communications Facilities and I participated in the preparation of that.

Q. Did you prepare for Mr. Hitz or for the United States Attorney's Office, any written statement or memorandum relating to this indictment? A. Do you mean, did I personally?

Q. Yes. A. The answer to that question is no. Excuse me.

Mr. Hitz: Just a minute. I object to that, Your Honor. It is irrelevant and immaterial and if the Court rules in my favor I would like the answer to go out and I want to move for that.

The Court: No, I will overrule the objection.

A. The answer to that question is no and I emphasize that I did not personally.

102 Q. Was any statement for Mr. Hitz prepared under your supervision? A. No, sir.

Mr. Hitz: I object.

Mr. Arens, will you please give me a chance to object.

The Witness: I beg your pardon.

The Court: Overruled. He has answered now.

Q. Did you sign any statement or submit in your name any statement to Mr. Hitz in connection with the proceeding before us here? Whether it was prepared by you or by someone else? A. I don't believe I did. I have no recollection of doing so. The reason I must explain that I am not the staff man who works on the contempt cases. It is the counsel who does that.

Q. Do you recall—I am now referring to statements that you either wrote or adopted as your own and which were given to counsel for the United States for the purpose of preparing for this case? A. As I say I have no recollection of it. When I say a document is my own I want to be sure that I don't misconstrue what you mean by that. The counsel to the Committee is a subordinate to myself in that I am staff director, but he handles without my

103 immediate supervision all of the contempt matters.

Q. You did consult with Mr. Hitz in preparation of your testimony here, didn't you? A. Oh, of course.

Q. In the course of that preparation you submitted no written memorandum to him?

Mr. Hitz: Your Honor, I object to that. It has nothing to do with the trial of this case or this witness' testimony if he gave me any written document.

Mr. Rabinowitz: It might, Your Honor. It might come squarely under Section 3500.

Mr. Hitz: That is not the question.

Mr. Rabinowitz: Yes, it is.

The Court: Yes, I will overrule the objection.

A. The answer to that question is no.

Q. You recall Mr. Silber's testimony and I assume you have read it in preparation of your testimony here today? A. Yes, sir, and I read it in the proceedings today.

Q. And you recall at one point in his testimony, it is on page 1498 of Part I, I don't know what page it is on in the exhibit before the Court, Mr. Silber said that he declines to answer a question on the grounds set forth in the decision of the Supreme Court in the Watkins and Sweezy cases and the statement filed with the Committee by Mr. Grumman on July 18, do you recall that testimony, do you not? A. I see it now, yes, sir.

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Mr. Hitz: Would you give me the page number, please?

Mr. Rabinowitz: Page 1498.

Q. Were you at that time familiar with the Grumman statement which had been filed with the Committee on July 18?

Mr. Hitz: Excuse me, I object. It is irrelevant and immaterial.

Mr. Rabinowitz: Your Honor, the witness in the course of his testimony sought to incorporate by reference, a document which had been introduced into a previous hearing. I do think that should be part of the record in this case and part of his answer.

The Court: How would this witness be able to make it a part of the record?

Mr. Rabinowitz: I would like to get him to identify the statement.

The Court: I will overrule the objection.

Mr. Rabinowitz: Will the reporter read it back?

(Reporter read the question.)

A. I presume I was. Or, I assume I was. I guess I was. I don't recall it at all.

The Court: Were you present when Mr. Grumman testified?

The Witness: Yes, sir, I was present when he submitted the statement but I do not presently recall whether

105 I read the exchange we were then having with Mr. Grumman.

Q. Well, you read it at some time or other, didn't you? A. I don't know whether I did or not.

Q. Well, I would like to call your attention to the document which I think you have in your hand? A. I have found the Grumman statement here on 1441.

Q. 1441? A. Yes.

Q. That is the statement submitted by Mr. Grumman at that hearing? A. Yes, sir, yes, sir.

Q. On July 18? A. Yes, sir, that is correct, yes, sir.

Mr. Rabinowitz: Well, Your Honor, I would like to offer it into evidence and perhaps the easiest way would be to read it into the record. Otherwise, of course, I would have to tear it out of here.

The Court: Do you have any objection to his reading it?

Mr. Hitz: Yes, I do. I don't think—I think that Mr. Silber adequately made his objection without the necessity of reading Mr. Grumman's statement. I think there was—

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110 The Court: I do not believe that testimony reflected an acquiescence by Mr. Silber in the ruling of the chairman. I think he is entitled to include it in this record the Grumman statement and if you want to you may read it into the record.

Mr. Rabinowitz: Thank you, Your Honor.

111 I have conferred with counsel, in the light of the decisions of the United States Supreme Court in the Watkins and Sweezy cases. I am advised by counsel that the powers of this committee are strictly limited, especially when the committee seeks to compel a witness to testify "about his beliefs, expressions or associations." Such questioning, said the Court, constitutes governmental interference with free speech, press and assembly. The court further pointed out that a committee may not call witnesses just to expose or punish them but only for a necessary legislative purpose. So, said the Court, the

protected freedoms of free speech and assembly "should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need."

And further the Court said, "We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."

"But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the
112 private affairs of individuals without justification in terms of the functions of the Congress. This was freely conceded by the Solicitor General in his argument of this case. Nor is the Congress a law enforcement or trial agency. These are functions of the Executive and Judicial departments of Government. No inquiry is an end in itself: it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."

Further in the same decision, the Court said, "Kilbourn against Thompson teaches that such an investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. United States v. Rumely makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress

in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every Congressional investigation is justified by a public need that overbalance any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion, or assembly."

113 The sub-committee asserts that it has been authorized by the committee to conduct this investigation. But that does not meet the test laid down by the Supreme Court—namely, that the House of Representatives make such an authorization. So far as I know, the House has never authorized this investigation either before or after House Resolution 5 was declared by the Supreme Court in the Watkins case to be unconstitutionally vague.

Now, as to the question of security in the communications industry:

Some of the communications monopolies have attempted to make my organization and its members targets of special repressive legislation. They point to the nature of the industry and its importance to the national defense.

The fact is that special legislation has existed for many years to protect the national interests in the communications industry. The Federal Communications Act of 1934 makes it a criminal offense for anyone to divulge the contents of a telegraph or cable message, or to commit sabotage. Severe penalties are provided for acts in violation of this law, and yet there is no record of any member of my organization or any other union in this industry, so far as I know, having been charged with, let alone convicted, of violation of the law.

As to the record of my organization in the fight for the national interest, we are ready and willing and anx-

114 ious to match it with any group of employers, government agencies, or anyone else. In war or peace there is no group of employees in the United States, and

no group of any kind, with a better record of devotion to the interests of our country. In fire, flood, or disaster on land or sea, members of our Union have written an heroic record. That has been attested to by many people in high places over the years.

During World War II our union proposed, and the Government adopted, the American Communications Association Safety and Anti-Espionage Plan to guarantee safety of communications and convoys at sea. Commander E. N. Webster (once a commissioner of the FCC) speaking for the Commandant of the Coast Guard, said of ACA with respect to this plan: "The thorough study made by the ACA of the complex problem of providing, in time of war, greater protection of life and property at sea is most commendable and the suggestions of the union have guided the various Government agencies in providing those vitally needed protective measures."

General Dwight D. Eisenhower, in response to a no-strike pledge of our union during the War, spoke as follows: "All ranks of the Allied forces are deeply grateful for your pledge of continued cooperation. We fully appreciate the vital part played by all groups affording communications."

We could quote dozens of other distinguished Americans and newspapers in a similar vein.

115 In peacetime, similarly, ACA has not only fought in the interests of its members as part of the general national public interest, but has been an effective and sometimes the only voice against attempts of the telegraph communications monopoly to impose higher rates and to curtail service to thousands of communities.

Similarly, we are engaged in a continuing struggle to defeat the current attempts to secure a merger of international communications by creation of a monopoly; the chief advocate of such merger being Admiral Ellery Stone of AC&R. Our opposition to this is based on our conviction that the national defense, the general public interest and the interest of the employees would be adversely affected by the creation of such a monopoly.

In the light of our record of steadily raising the average wages of telegraph workers for the past 20 years, securing paid vacations, improved pensions, higher sick benefits, night differentials, daily overtime and other premium pay, and job security, it is not surprising that the corporations in this industry initiate and support legislation designed to destroy our union and all other labor unions which serve the interests of the American working people.

Finally, because there has been reference in these hearings to the possibility or potentiality of espionage or sabotage in this industry, I wish to make it clear that I have never heard of any worker, in any section of the
116 industry, being engaged in or even charged with, let alone indicted or convicted on a charge of espionage or sabotage.

And so, with all respect to this committee, acting on the advice of counsel, I shall decline to answer questions concerning my beliefs, expressions or associations on the ground that such questioning constitutes an interference with my rights under the first amendment to the Constitution and that such questioning is beyond the jurisdiction of the committee. The enabling resolution itself is an unlawful delegation of power to the committee. Moreover, I do not believe that any such questioning can be pertinent to any legitimate inquiry by the committee under its enabling resolution.

That is the end.

By Mr. Rabinowitz:

Q. Mr. Arens, you have stated, have you not, that the purpose of this investigation, as set forth in the resolution of the Committee, was to investigate, among other things, Communist infiltration into the Communications industry and the activity of the Communist Party in the communications industry and possibilities of espionage or sabotage in the industry. Is that right?

Mr. Hitz: By way of objection, I wonder—I am sorry,

I won't object but I want to be certain that the witness has in mind the question. In effect it is, did you so testify? Do I understand that correctly, Mr. Rabinowitz?

117 Mr. Rabinowitz: That is the question.

Mr. Hitz: Now did you hear his question and do you understand it to be, did you so testify?

The Witness: The question is a little vague. The question as I understand it, is did I testify that the opening statement or the resolution of the Committee said certain things. The record, of course, will speak for itself on what the opening statement or the resolution contains, appearing on page 1378 is the opening statement of the chairman, and the resolution of the Committee appears on page 1377.

Mr. Rabinowitz: I will rephrase the question if it is so confusing.

Q. The resolution adopted by the Committee on July 10, 1957, was a resolution which approved and authorized the holding of these hearings? Is that right? A. That is the resolution on page 1377.

Q. Well, I am reading from page 1467. I assume it is the same resolution? A. This is the resolution as adopted on July 10. Yes, sir.

Mr. Hitz: Which one are you looking at Mr. Arens?

The Witness: I am looking on page 1377 of Part I.

The Court: Is that the same resolution on page 5 of the proceedings involving Bernard Silber?

The Witness: I do not have that before me so I

118 couldn't say.

Mr. Rabinowitz: I am sure it is, Your Honor. There is only one.

The Court: July 10, 1957?

Mr. Hitz: We believe it to be too, Your Honor.

Q. And the purposes of the investigation are set forth in that resolution, are they not? A. Yes, sir.

Q. Can you state why you did not question Mr. Silber concerning the subject of that resolution?

Mr. Hitz: I object.

The Court: Objection sustained.

Q. Did you question Mr. Silber concerning the possibilities of sabotage in the communications industry?

Mr. Hitz: I object.

The Court: Objection sustained.

Q. Did you question Mr. Silber concerning any of the activities of the Communist Party in the communications industry?

Mr. Hitz: I object.

The Court: Objection sustained. I assume the record shows what he did question him about.

Q. Why did you not question Mr. Silber concerning the activities of the Communist Party in the communications system?

Mr. Hitz: I object.

The Court: Objection sustained.

119 Q. Why did the Committee limit its questioning of Mr. Silber to the names of other persons even though he testified he had been a member of the Communist Party himself?

Mr. Hitz: I object.

The Court: The objection is sustained.

Q. At the time you questioned Mr. Silber or the Committee questioned Mr. Silber, concerning the membership of other persons in the Communist Party, the questions which are the subject of the indictment here now, did you have in the records of the House Committee, through the testimony of other witnesses, any information on the alleged Party membership of officers of the American Communications Association? A. Yes, in public testimony a number of these people, including Joseph Selly, president, Joseph Kehoe, secretary and treasurer, Dominick Panza, international vice president, Charles Silberman, editor of the ACA News, and others had been identified by competent live witnesses under oath as persons known by them to be members of the Communist Party.

That was public testimony.

Q. Did you credit that testimony?

Mr. Hitz: I object.

The Court: Objection sustained.

Q. Aside from the persons you have named, who else do you remember were identified? A. I do not
120 recall.

Q. Do you recall whether there were other officers who were so identified? A. I think these are the officers that I just called off. The president, secretary-treasurer, vice president, and the editor of the ACA News. I am not at the moment,—

The Court: He said were there any others.

Q. Were there any other officers? A. I don't believe there are any other officers.

Q. Well, are there any other past officers? A. I don't recall.

Q. Do you remember a reference to Josephine Timms? A. Perhaps I could refresh my recollection.

Q. Well, I will try. You can look at page 1416, I believe of Part I, which is the testimony of Mr. Mignon. Does that refresh your recollection with respect to Josephine Timms? Almost half way down the page? A. Yes, the record again speaks for itself that he testified—Mr. Mignon, that he knew Josephine Timms to be a member of the Communist Party or to be a Communist. Yes, sir.

Q. And he testified also as to many other local officers of the ACA, didn't he? A. That is correct, yes, sir.

Q. And had you received—incidentally, another witness named Greenberg also corroborated this testimony, didn't she?

121 Mr. Hitz: I object.

The Court: What is the objection on?

Mr. Hitz: I don't think that it is relevant or material that one witness corroborated another before the Committee because the Court, and I do not think any appellate court, could say up to a certain point inquiries can be made

but beyond that and one corroboration you cannot go. There must be the materiality and I say that is not sufficient materiality.

The Court: I think it is material and I will overrule the objection.

Q. Will you answer the question, Mr. Arens? A. The question is if Concetta Greenberg likewise—

Q. Yes, identified most of these same people as members of the Communist Party?

The Court: I am not suggesting that the Committee did not require further corroboration.

A. I don't challenge it. I don't have a present recollection of it but the record here again speaks for itself.

Q. Well, why don't you look at it? You have it in front of you, Mr. Arens. A. Well, according to this transcript here she was a member of the Communist Party and did in the course of her testimony tell about other persons whom she knew as members of the Communist Party. It would be a conclusion on my part to say she corroborated the testimony of another witness without comparing it.

122

Q. Well you just look at the bottom of page 1507 for example. A. Yes, I see here that she did testify that she knew other members of the Communist Party, other members of the American Communications Association as members of the Party, namely, Selly, Kehoe, and Siebenberg. I don't know whether Siebenberg was identified in this record by Mignon or not. I would take your word if you said he was.

Q. And Townsend? A. Townsend, yes.

Q. And as a matter of fact there were other witnesses at that hearing who similarly testified to the Communist Party membership of numerous officers? A. Yes, in general I can agree with you. I don't want to be in a position of trying to say they corroborated the testimony of another witness in toto. The general theme that you are pursuing I can certainly concur in what you are saying, namely,

that there were a number of witnesses who swore they had been in the Communist Party and while in the Party knew a number of people, sometimes duplicating the testimony of others, who had been Communists.

Q. And these people included many of the officers of ACA? A. The persons who were identified as the
123 Communists, yes, sir, were ACA officers, yes, sir, that is correct.

Q. And that included the testimony of Mr. Finsmith and Mr. Iannucci, and Mr. Solga, and Mr. Rothbaum as well as Mrs. Greenberg? A. Speeking in general terms, I concur in what you are saying, yes, sir.

Q. Aside from the testimony of these witnesses did you have in the files of the Committee on Un-American Activities, other information concerning the political activities of Communist Party membership of officers of ACA? Just answer yes or no. I am not going to ask you to produce it. A. Well, I won't at any time concede that Communist Party activities are political activities. That is what the Communist say. We had considerable information and do have it now of the subversive activities, Communist activities, treasonable activities, un-American activity, of people in the ACA and the officers of ACA, yes, sir.

Q. In addition to the testimony that was brought out at this hearing? A. This particular hearing. Oh, yes, sir. As I said, I have been in this prior to the time I came with the Committee on Un-American Activities. We had hearings on the other side in which we were in the same general field which we did not explore, in some facets, as thoroughly, I don't believe, as we did here.

124 Q. You used the expression un-American activity in an answer of yours a moment ago, would you define that term for me?

Mr. Hitz: I object.

The Court: I will sustain the objection.

Mr. Rabinowitz: The witness used the term.

The Court: We are going a little far afield here.

Q. By the questions which are the subject of this indictment, Mr. Arens, what information did the Committee expect to get from this witness that it had not already received from Mignon, Finsmith, Greenberg, Solga, Rothbaum, Iannucci, and the other persons who supplied the information in the files of the Committee?

Mr. Hitz: I object.

The Court: The objection is sustained.

Mr. Rabinowitz: Your Honor, it goes to the question of pertinency.

The Court: The objection is sustained.

Q. What legislative purpose would have been served by the answers to the questions which are the subject of this indictment?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Rabinowitz: Your Honor, subject to the matter we left open a little while ago, I have nothing further.

125 Redirect Examination

By Mr. Hitz:

Q. Mr. Arens, Mr. Rabinowitz asked you a question about the resolution of July 10, which is contained in Government's No. 4, I would like to ask you whether that did authorize this communications investigation, so-called, or did it merely document the fact that it had heretofore been authorized?

Mr. Rabinowitz: I object.

The Court: The objection is sustained.

Q. Mr. Arens, at what time did the Committee originally authorize this investigation in the communications industry?

Mr. Rabinowitz: I object, Your Honor.

The Court: Do you mean formally authorized? The first formal resolution as I understand it is July 10.

Mr. Hitz: Well this is the first documentation.

The Court: The first documentation?

Mr. Hitz: On cross-examination Mr. Rabinowitz asked a question which the witness rather rapidly replied to in the affirmative that this was the authority for it. I am trying to bring out the situation with respect to that, whether it was the authority for it or whether it was merely the documentation of the authority for it. Your Honor, I think there is a little difference there.

The Court: He may answer. I think I understand his testimony but if it is not clear he may answer.

126 Mr. Hitz: I was merely trying to clarify something that happened on cross. I think his direct is clear.

A. Well—

Q. Mr. Arens, did the resolution of July 10th authorize the—did it initially authorize this investigation or had the investigation been authorized prior to that? A. It had been authorized prior to July 10th by the Committee. But this is the formal documentation, as you said there a moment ago, which is read and put into the record at the hearing itself.

Q. And was that earlier authorization prior to June 21, 1957? A. Yes, sir.

Mr. Hitz: Thank you.

Recross Examination

By Mr. Rabinowitz:

Q. Was there any resolution adopted by the Committee evidencing this so-called earlier authorization? A. If by resolution you mean a formal printed resolution the answer is no. If by resolution you mean expression or the will of the Committee in the composite in the aggregate, the answer is yes.

Q. Was there any action taken by the Committee with respect to this so-called authorization of the investigation which was noted on the Committee records in com-

127 pliance with the House Rule that I referred to awhile ago? A. When you say compliance with the House Rule that causes me to have to read the House Rule to

see whether or not—in my judgment what happened was in compliance with the House Rule.

Q. All right. Yes, I am referring to Rule XI, subdivision 26B which says: Each Committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded. A. Yes. There is no matter on which a record vote was demanded pertaining to this investigation which the Committee exercised or proceeded to have a record vote.

Q. Well, I am not referring to the second sentence. I am referring to the first sentence of the Rule which says: Each Committee shall keep a complete record of all Committee action. Now, is there a record of Committee action authorizing this investigation prior to the resolution of July 10th? A. If you will let me respond this way. The Rule says—

Q. Can't that question be answered either yes or no? A. Give me the question again. I may be a little bit too particular here. I don't mean to be.

Mr. Rabinowitz: Will the secretary read it?

The Witness: I just don't want to be in the position—

Mr. Rabinowitz: Let the stenographer read the
128 question.

(Reporter read the question).

A. I do not believe so.

Q. Can you find out for us, Mr. Arens? A. I would be morally certain that there is no such formal record because this is the formal record that I have here. If you take the Rule that you allude to there and take it not out of context you will see—not one sentence out of context you will see that the Rule is applicable to Committee actions which require formal votes. If the Rule is taken literally it means that every Committee action, including walking in and out the door, scribbling notes, and the like, which would be ludicrous.

Q. Now you are a member of the Bar. A. I certainly am, yes, sir.

Q. And do you think that the Rule which says that each Committee shall keep a complete record of all Committee actions would require the Committee to keep a record of people walking in and out of the door? A. No, sir, I do not but I am only suggesting that the only type of record which the Rule requires, when read in its complete context, not just one sentence taken out of context, is a record of the actions of the Committee requiring a—

The Court: I do not see the necessity for arguing
129 this point. The Court is familiar with the Rule.

As I understand it you say there was no record of the action taken by the Committee prior—

The Witness: That's correct.

The Court: —to the resolution of July 10?

The Witness: That's correct.

The Court: Is that right?

The Witness: Yes, sir, yes, sir.

The Court: All right.

Mr. Rabinowitz: That is all, Your Honor.

Mr. Hitz: That is all, Your Honor.

The Witness: May I find out about my status on the direction of the Court to produce some records?

The Court: I think you better find out whether you can produce them tomorrow morning.

The Witness: I would like to inquire of the Court if I have leave of the Court to have some liberty to make inquiry of the Committee on this? I am under a mandate of the Court to produce these records and I—

The Court: You may proceed now and let me know tomorrow morning how much progress you made.

Do you have anything further at this time, Mr. Hitz?

Mr. Hitz: Not at this time, Your Honor.

The Court: The witness is excused. (Witness left the stand.)

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132 Redirect Examination

By Mr. Hitz:

Q. Mr. Arens, are you able at this time to tell us what occasioned the Committee's first interest in Mr. Bernard Silber, to your personal knowledge?

Mr. Rabinowitz: I object, Your Honor. I thought the witness had already testified to that.

The Court: He may answer.

A. The interest of the Committee in Mr. Silber stemmed from the information which the Committee acquired that Mr. Silber was engaged as one of the employees who was connected with the American Communications Asso-
133 ciation, who had access in his work to Government coded messages or Government messages whether coded or not. I don't recall at the instant.

He then being one of those persons who was allied with ACA, who had access to Government coded messages, we checked in what we call our public files the names of those persons and discovered that Mr. Silber had been involved in litigation in which he was alleged to have been in general terms, a Red. That precipitated our interest in him from which we sought to seek other information.

Q. Now from the public file or the public files from which you said it was indicated he was "Red". Can you tell us the source of that piece of information? A. Yes, sir, the New York Times had an article in 1940 telling about litigation and I have a copy of it with me, telling about litigation between the American Labor Party and certain persons who, according to the context of the article, were Communists or allied with the Communist Party.

This article listed the names of all the defendants, including the names of the defendant in our proceeding here today. That was the item which gave us an alert that we should look further.

Q. Now then the term Red which you just used, is that your expression or is that the expression used in that New

York Times article of 1940? A. It is the expression used in the article or in the article or in the caption to
134 the article and in the body of article, I have a copy of it with me now. Now in the body of the article there appeared other information respecting an alleged infiltration of the American Labor Party by members of the Communist Party. And the article said in effect that a number of members of the Communist Party had infiltrated the American Labor Party and a number had done other acts which would at least arouse an interest in an investigation such as our own; that that person would be one whose activities we would want to explore.

Q. And as I understand it you already had information that he was employed by the Western Union and a member of the ACA which was a union in the industry? A. That is correct, yes, sir.

Q. To your knowledge, was the Committee possessed of that information prior to the time to the issuance of the subpoena for Mr. Silber on June 21, 1957? A. Yes, sir.

Q. Did you have knowledge of those matters for information? A. Yes, sir.

Q. Did they play any part in your recommendation to the chairman that Mr. Silber's name be included among those to be subpoenaed for the communications hearings?

A. Yes, sir. A decisive part, I should say.

135 Q. What? A. A decisive part, I should say.

Mr. Hitz: Your Honor, on this information we submit that we have shown sufficient reason for the Committee to have called Mr. Silber, and we offer that and ask the Court so to rule, and I think, however, that Mr. Rabinowitz would be entitled before the ruling to cross-examine Mr. Arens on this information and testimony that he has given today.

And when he has concluded I would again ask the Court to rule that that would have been sufficient reason for the Committee to have called Mr. Silber before the Committee. If Your Honor doesn't care to make a definitive ruling at

that time, we are prepared to rest upon that information. We feel that it is more than sufficient. I will urge the point again and I can invite Your Honor's attention to the law and the facts stated in the Marshal case, as being more than an ample precedent of the sufficiency for the reason to call Mr. Silber.

And I may say that we are confident that this information presented today in this testimony would be sufficient so we might be precluded from compliance with the order of yesterday, that we produce a Committee intra-staff document. This is in the nature of either public information such as the New York Times or other information which the Committee is prepared to produce and has produced in the testimony of Mr. Arens so we have that purpose in mind.

The Court: You may cross-examine.

136 Recross-Examination

By Mr. Rabinowitz:

Q. Mr. Arens, when you first discovered this information with respect to the fact that Mr. Silber was a member of ACA with access to coded messages? A. It was either late in 1956 or very early in 1957.

Q. And what was the source of that information? A. The Western Union Telegraph Company.

Q. Was that who in the Western Telegraph Company?

Mr. Hitz: I object.

The Court: The objection is overruled.

A. I couldn't tell you because I do not know.

Q. Was that reported to you by one of your investigators? A. Yes, sir.

Q. By whom? A. I couldn't tell you. I could tell you it was either one of two investigators. It was either Mr. Russell or Mr. Jones because both of them were working on the project.

Q. Was that the subject of a memorandum, any written memorandum in the Committee's files? A. No, sir, it was

not. It was the subject—well, I will tell you what happened if it will be clarified.

Q. What was it—written? A. No, sir, it was not. There is a writing on it. I don't want to be—

137 Q. There is a writing on it? A. Yes, sir.

Q. In the Committee's files? A. Yes, sir.

Q. I would like to have that writing. A. I have that writing with me right now. What this is, is a photostat of an employee's service record which was supplied to an investigator of the Committee, who in turn, laid it before me of Bernard Silber.

Q. May I have it? A. Yes, sir. (Witness passed document to counsel.)

Mr. Rabinowitz: Your Honor, may this be marked Defense Exhibit 1 for Identification.

The Deputy Clerk: Defendant's Exhibit 1 for Identification. (Document marked for Identification.)

Q. Now Mr. Areus, I understand that this photostat is a photostat taken from the files of the Committee? A. No. That is the document in the Committee files.

Q. I am sorry. This is a photostat and the photostat was taken from the Committee files? This document that I am holding in my hands? A. Yes, sir, that was taken from the Committee files, the document you have in your hands. I did not photostat it. But it is in the Committee files, the physical document that you have in your hands now, yes, sir.

138 Q. And this is one of the documents that you relied on in determining to call Mr. Silber? A. That was the start. I don't want to say that I relied on that document per se. As I explained, I better make it clear here, so you don't have a misconstruction of the significance of that document.

In anticipation of the expiration an investigation by the Committee, we sought to find out who, who are connected with the Communist control of the American Communications Association had access to government messages. In

order to ascertain that fact as a starting point, we had either two sources from which we could get that information, either ACA itself, which, of course, wouldn't give us the time of day or the company.

We went to the company and requested from the company the names of and what information the company had on persons who had access to Government coded messages or Government messages. The investigator returned with that document which you have in your hand now, giving the employment record of Silber. But that document does not show anything about any Communist connections. Then we took that document, together with others, and checked against what we call our public files which gears us into public documents and the public document—

Q. All right. Let us confine ourselves to this for
139 the moment. A. All right.

Mr. Rabinowitz: I would like to offer this in evidence, Your Honor.

Mr. Hitz: No objection.

The Court: It may be received.

(Document admitted in evidence.)

Q. Mr. Arens, will you show me where on that document there is any notation to the effect that Mr. Silber had access Government coded documents? A. I didn't say this document does and I doubt if it does. In fact I haven't read this document for many months. I would very much doubt it does. I think I explained in the process of procuring this document we requested the company to give us—

Q. Did you request the company? A. The investigator did.

Q. Well, then don't tell us what somebody else did. Just tell what you did. You examined this document? A. You don't want me to testify to what anybody else did?

Q. Just what you did? A. I examined the document, yes, sir.

Q. And is there anything on that document that would establish the fact that the defendant had access to
140 coded messages? A. I see no such information on this document.

Q. When did you say you got that document? A. My best judgment is that we got this document in the latter part of 56 or very early 57.

Q. What do you mean very early 57? A. The first two or three months of 57.

Q. Why do you place the date at that time? Is there any reason? A. Yes, sir, one reason I placed the date at that time is reflecting upon this document—I am glad you asked that question—is that shortly after receiving this document—let me hold this for a minute—because I have to allude to some dates here. Shortly after receiving this document and others, we sent these to our public files. We have no hesitancy to make available information from public files.

The public files people came back with a thermafax of our cards on a Bernard Silber alluded to in this document. The information coming back from the public files people is dated April 17, 1957. That is on this document here which I have in my hand. So I would from that conclude that the request to our public files people for information about Silber, of course, ended April 17, 1957, and I would conclude from that in my own mind it was perhaps within a month or so prior to April 17, 1957 but I moved it back into December of 56 or the latter part of 56 just because I didn't want to be too confined and restricted in my
141 actual testimony because I am not certain in my own mind.

Q. And may I see that document? A. Yes, sir. This document which I am now handing to you is a thermafax dated April 17, 1957 of the two cards which appear in the public files of the Committee on Un-American Activities.

And those cards as you see, a Bernard Silber—indicate a Bernard Silber at a given address there, had been a participant in some type of nominating process for I believe either Israel Amter or Benjamin Davis, one of the Communist candidates. I don't recall at the instant which or who of the two he was alleged by those cards to have been engaged in a nominating process.

Q. Now Mr. Arens, you also said you had a photostat, you had in the Committee files a copy of the New York Times or a photostat of the New York Times? A. I have that here with me, yes, sir. This is the New York Times. This is a photostat that I have in my hand of the New York Times, Monday, January 15, 1940. The article to which I alluded a few moments ago is entitled Labor Party Sues to Oust 99 as Reds. In the course of the body of the article it is stated that—

Q. Well, let's—we can all read it. A. Yes, the article speaks for itself. The article also lists in there
142 as one of the alleged 99 Reds—

Mr. Rabinowitz: Mr. Arens, we can all read it and we will come to our own conclusion as to what it says.

Your Honor, I would like to offer first the document from the Committee files dated—I gather this is a thermafax of the documents in the Committee files, dated April 17, 1957, and headed for Mr. Russell containing, from what the witness has designated, as cards relating to the defendant.

Mr. Hitz: No objection.

The Court: Have it marked first as Defendant's 2.

The Deputy Clerk: Defendant's Exhibit 2 for Identification. (Document marked for identification).

The Court: It will be received.

(Document admitted in evidence.)

Mr. Rabinowitz: I offer next a photostat of two pages of the New York Times. The first page and the ninth page, dated January 15, 1940 which the witness has also identified as coming from the Committee files.

Mr. Hitz: No objection.

The Deputy Clerk: Defendant's 3 marked for Identification. (Document marked for identification.)

The Court: It will be received.

(Document admitted in evidence.)

Q. Mr. Arens, was it on the basis of these documents which have just been admitted in evidence that you directed your investigators to make further investigation into Mr. Silber? A. Yes, sir.

Q. And did they make such further investigation? A. Yes, sir.

Q. And did they report back to you? A. Yes, sir.

Q. And is there any further writing in the Committee files relating to this subject matter in the Silber case, sir? A. Yes, sir.

Q. May I have them?

Mr. Hitz: Objection, Your Honor. • • •

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The Court: Do I understand that the Government is withdrawing from the case all of the testimony yesterday dealing with probable cause and relying solely upon the evidence that we have received this morning?

Mr. Hitz: We are prepared to do that • • •

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The Court: I disagree with you Mr. Hitz. I think that the testimony that the witness gave yesterday is subject to cross-examination on that testimony and I overrule your objection.

The Court: What was the question?

Mr. Rabinowitz: I believe I asked for the document which the witness said was in the file.

The Witness: I have that document and will produce it.

Q. Let me ask— A. Let me identify it. Let me identify the document that I am handing to you. This is a

document which was in the Committee files which I saw last night—which I think I saw yesterday afternoon, and which I have taken from the Committee files pursuant to the direction of the chairman of the Committee, Congressman Walter.

Mr. Rabinowitz: I would like to offer this, Your Honor.

The Court: It may be marked and do you have any objection to it being received, Mr. Hitz?

Mr. Hitz: No, if he were not going to offer it, I would. I think it is extremely helpful to the Government's case. We just don't like this rummaging around, that is all.

The Deputy Clerk: Defendant's 4 for Identification.

(Document marked for identification.)

The Court: It will be received.

(Document admitted in evidence.)

Let me see it, please.

(Defense counsel handed the exhibit to the Court.)

Mr. Rabinowitz: That's all.

Redirect Examination

By Mr. Hitz:

Q. Mr. Arens, I believe you testified you received the information that Mr. Russell had obtained information from a confidential informant that Mr. Silber had
151 been a member of the Communist Party and was in the communications field or working for Western Union and in the American Communications Association. You got that orally from Mr. Russell, is that correct? A. I got that orally and then some time in the process he committed it to writing. Whether or not I have ever seen the writing I couldn't say. It was in the files, however.

Q. The exhibit, Defendant's No. 4 is dated June 12, 1957, which would make it some 9 days prior to the issuance of the subpoena. Now do you recall whether you gave to

the Chairman of the Committee at the time you suggested Mr. Silber be included among these witnesses, the information or the substance of what is contained in this memorandum? A. The only honest answer I can give is that I do not recall specifically. I discussed with him a number of cases and recommended a number of persons be subpoenaed and was satisfied in my own mind that they were possessed of information which the Committee was entitled to have.

In the course of the conversation he authorized and directed issuance of the subpoenas to a number of persons including this defendant in the proceeding today.

Q. I see. Now on the—in some of Mr. Rabinowitz's recent questions and in some of his colloquy with the Court, there seemed to be an inference that he sought to draw, to the effect that you meant to testify and did testify that you recommended the inclusion of Mr. Silber's name on
152 the witnesses solely upon the information orally given by Mr. Russell.

I would like to ask you whether it is a fact that you recommended that Mr. Silber's name be on that list of witnesses solely on Mr. Russell's information orally given or whether also on other information? A. It was on the whole body of the information. As I tried to explain today, including the New York Times article which would arouse any Committee who is charged with investigating Communism to say is this man a Communist? Is he possessed of information and the cards from our public files, and the fact that he, according to the information related to me, had them access to confidential Government code and was in ACA, which was American Communications Association, which is controlled by Communist Agents serving under indirect orders of the Kremlin.

Mr. Rabinowitz: Your Honor, I move to strike that out. It is not responsive to the question and it, it isn't evidence and I do not think it belongs in the record. I am refering now to the last half of the witness statement.

The Court: I will deny it.

Q. Prior to deciding to recommend to the chairman to include Mr. Silber's name, were you aware of the contents of the Times article that you have referred to and which is a defendant exhibit today? A. Yes, sir. I went over the material and discussed it discussed the
153 cases with the investigators as we were proceeding in the investigation.

Q. All right. Now had it been your experience that when the New York Times called somebody a Red, the likelihood was it could be relied upon?

Mr. Rabinowitz: Objection.

The Court: I will sustain the objection.

Mr. Hitz: That is all I have, Your Honor.

Recross Examination

By Mr. Rabinowitz:

Q. You did discuss the substance of this memorandum which is defendant's Exhibit 4 with Mr. Russell either before or after he submitted the memorandum? A. Yes, the information he related to me, as I have said here repeatedly, orally, some place in the process he committed that to writing. And I found that yesterday. I had no recollection prior to yesterday that that particular document which you now have in your hand from the files of the Committee on Un-American Activities was in being. I didn't doubt that it might be in being. I just didn't know.

Q. But you do remember that you did discuss the matter orally with Mr. Russell? A. Yes, sir.

Q. Now this memorandum— A. I remember discussing the entire case including that article with Mr. Rus-
154 sell or Mr. Jones. I remember the discussion of the Silber case.

Q. Well did you discuss the contents of this memorandum with Mr. Jones? A. It was signed by Mr. Russell. A. I am saying that we had two investigators assigned to in-

vestigate these Communists who had access to communication secrets of this Government and I would repeatedly be in session with them discussing the various cases. Who actually prepared that memorandum I couldn't say.

Q. Well look at it. A. I say from my recollection. It is obvious. I can read now, Mr. Rabinowitz, it was prepared by Mr. Russell.

Q. Does that refresh your recollection that you discussed this case with Mr. Russell? A. No, not specifically with Mr. Russell because I was in constant and frequent conversation with both Mr. Russell and Mr. Jones. Not constant but frequent conversation with both Mr. Russell and Mr. Jones. It doesn't refresh my recollection. It makes me conclude in my own mind that the specific conversation I had on this item of information must have been with Mr. Russell. I am trying to be explicit and careful here because you pronounced to this Court that you do not believe me. You think I am lying so I want to be exceedingly careful that what I do say here is in complete accord with facts.

Q. Now you note that there is a statement in that
155 memorandum from Mr. Russell that says it is believed that he definitely will take the Fifth Amendment. Did you discuss that aspect of the situation with Mr. Russell? A. I probably did, yes. I believe I did and the fact is that Mr. Rusell was in error because he didn't take that part of the Fifth Amendment, against self-incrimination.

Q. Did the fact that Mr. Russell said that the witness would probably take the Fifth Amendment cause you to hesitate in determining whether or not you would call him? A. No, because as is illustrated by this very case the fact that the investigator anticipated the man might take the Fifth Amendment or said it is believed that he will definitely take the Fifth Amendment shows that the investigator was in error because the man did not take the incriminating clause of the Fifth Amendment when he testified before the Committee.

Indeed he gave us considerable information respecting his own Communist activities and did not take that part of the Fifth Amendment against self-incrimination so my judgment there was absolutely there confirmed as being sound in recommending to the chairman that Silber be called.

Mr. Rabinowitz: That is all, Your Honor.

Mr. Hitz: That is all, Your Honor.

Mr. Hitz: Your Honor, I wonder if the defense exhibits that emanated from the Government witness might be kept by the clerk?

156 The Court: Yes.

Mr. Hitz: The Government rests, Your Honor.

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Mr. Rabinowitz: Your Honor, I would like to move now at the close of the Government's case for a verdict of acquittal. May I address the Court on that?

The Court: You may.

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181 The Court: I am of the opinion first that there was good cause to issue the subpoena to call the witness before the Committee. And I am further of the opinion that the questions were pertinent to a legitimate legislative function, and that the defendant was not entitled to rely upon a mistaken interpretation of the Watkins case, and I will deny your motion to grant a judgment of acquittal.

Mr. Rabinowitz: Your Honor, I would like to present as part of my case as a witness Professor Thomas I. Emerson, who is a professor of law at Yale University, who will present expert opinion testimony will present expert opinion testimony on this subject of balancing, with particular reference to the elements which go to the

182 balancing which the Supreme Court held as appropriate in the Barenblatt case. I have already submitted to Your Honor in writing a statement of the testi-

mony which I would offer on this subject and would now ask Your Honor whether that I would now offer that testimony and if Your Honor holds that it is admissible, I will present Professor Emerson, who will give the testimony and, of course, be subject to cross-examination.

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183 Mr. Hitz: Your Honor, we object and I wonder if you would like for me to state the grounds for my objections so it may be at an appropriate place in the record if this record becomes one for further use.

The Court: Yes.

Mr. Hitz: I think it might be helpful to have them in juxtaposition to what Mr. Rabinowitz has just said.

First of all, it occurrs to me that this subject is not one which lends itself to expert testimony. It is my understanding that usually expert testimony is confined to an area of information frequently scientific or medical which is not generally known to many people, including lawyers and some judges, and that it is a field in which certain persons have achieved a specialty and are particularly well informed. I do not feel that such a subject as presented here and to the extent that it is not presented here, it would invade the providence of the Court and of any appellate court that had to read the record if it were in evidence.

In addition to that, it seems to be based upon facts of both sides of the balancing process which are invalid premises and I agree that that might be a statement which would go to the weight of the testimony, if it were admitted, but I think that the invalidity of the premises is such that it goes to the admissibility of this particular offer of proof. By that I mean it is premised upon the

184 proposition on the side of the process, that the Communist danger is inconsequential at this time. I consider that to be an invalid premise for the reason that legislative and judicial findings are all to the contrary.

And on the side of the individual First Amendment

rights, it is premised upon the theory that the Communist Party is a political activity. That is an invalid premise that is constantly being rejected whenever it is proposed, and likewise there are legislative and judicial findings to the contrary and unanimously so.

And finally, the offer in evidence I believe should be rejected for the reason that it endeavors to set Professor Emerson up as a person who would be substituted not only for the judge's providence here but for the legislative prerogative of obtaining testimony for legislative purposes with the sanctions against perjury and contempt.

And I thank Your Honor for letting me put those objections in at this point and I ask Your Honor to reject the offer of testimony but to accept the offer of proof.

* * * * * * * * * * *

185 The Court: I think the objections of the Government are well taken and I will sustain the objection.

186 Now, do I understand you want to make an offer?

Mr. Rabinowitz: Yes, I would. I would like, Your Honor, to offer, to make an offer of proof here of the proposed testimony of Professor Emerson and I would like to offer it as an exhibit. The exhibit will consist of the testimony that Professor Emerson gave, also under an offer of proof, at the trial of the United States against yellin in the United States District Court for the Northern District of Indiana, two weeks ago. I have here a transcript of that trial and I would like to offer it as an exhibit and as an offer of proof, portions of that transcript which I will now describe for the record, and I will withdraw the exhibit and make a copy of such parts I am offering and send that to the clerk.

It begins at page 216, third line from the bottom. It continues until page 225, line 6. Then it continues and picks up again at the top of page 247. I am sorry to take all of this time but Mr. Hitz lost my notes and continues to page 264, line 6.

Mr. Hitz: Is that the beginning or the end of the passage?

Mr. Rabinowitz: The end.

Mr. Hitz: From 247?

Mr. Rabinowitz: Yes, yes. What I am doing here is eliminating some of the testimony that related specifically to Gary to the Hammond case which would not be applicable here.

187 Then I begin again at page 265, line 18.

Mr. Hitz: Give me that page again.

Mr. Rabinowitz: Page 265, line 18 to page 282, line 1. That concludes my offer.

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The Court: Do you have anything further, Mr. Rabinowitz?

Mr. Rabinowitz: No, I rest.

The Court: Is there any further argument?

Mr. Rabinowitz: Your Honor, I would like to renew now at the conclusion of the case my motion for a direction of acquittal. I have no argument to make.

188 The Court: Do you want to say anything further, Mr. Hitz?

Mr. Hitz: I do not, Your Honor.

The Court: The motion which is renewed is denied. The judgment of the Court is that the defendant is guilty of counts one, three, and four of the indictment.

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April 14, 1960

The above-entitled matter came on for sentencing

190 The Deputy Clerk: Bernard Silber, step forward, please.

The Court: Mr. Silber, do you have anything you want to say as to why judgment of the Court should not be pronounced in your case?

Mr. Silber: I don't know anything I can say.

The Court: I cannot hear you, sir.

Mr. Silber: I really don't know anything that I can say.

I do not feel that I did anything wrong. I did whatever I did in good conscience. I have no desire whatever to hinder the job of the Government, to put it that way. I did what I felt because I believed, honestly believed my conscience justified it.

The Court: Mr. Rein, do you want the remarks you made in the case of Mr. Grumman to apply in the case of Mr. Silber?

Mr. Rein: Yes, I do.

The Court: Do you want to say anything further?

Mr. Rein: No, I think that I have said about all I can say.

The Court: I want to say here in respect to Mr. Silber that I am of the same view with respect to Mr. Silber that the background of the two cases are somewhat different.

191 I think the two individuals are somewhat different but insofar as the cases themselves are concerned, I think they are practically identical.

The sentence of the Court is he will be imprisoned for a term of four months and pay a $100.00 fine, which will be a sentence on the indictment rather than on the individual counts. In other words, one sentence of four months and a fine of $100.00.

Mr. Rein: Will your Honor fix the bond of a $1000.00?

The Court: The Court will fix the same bond of a $1000.00 which will apply both to the imprisonment and the fine

Mr. Rein: Thank you, Your Honor.

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Offer of Proof

THOMAS I. EMERSON,

a witness on behalf of the defendant, having first been duly sworn, testified as follows:

* * * * * * * * * *

Direct Examination

By Mr. Rabinowitz:

Q. Professor Emerson, what is your occupation? A. I am a professor of law at Yale Law School, Yale University.

Q. How long have you held that position. A. Since 1946.

Q. What is the extent of your formal education? A. I graduated from Yale College in 1928, and from Yale Law School in 1931.

Q. Are you a member of the bar? A. I am a member of the bar of the State of New York, and also of the United States Supreme Court.

Q. Will you state for the Court your employment experience prior to your appointment to the Yale faculty? A. When I first left law school in 1931, I was employed by the New York firm of Engelhard, Pollak, Pitcher and Stern. I worked for Walter H. Pollak in that firm. He was well known as an attorney handling civil liberties problems, and I did some work with him on civil liberties problems at that time. As a matter of fact, the first case I worked on after getting out of law school was the Scottsbor case, which was well known in the "30's" as a civil liberties case.

After two years in New York, I went to Washington, and had positions in the federal government for thirteen years, until 1946, when I went to Yale.

My first position was as assistant counsel in the National Recovery Administration. I was assigned as counsel for one of the four divisions of the legal division. Our division gave legal counsel and advice with respect to those N.R.A. codes which related to the textile industry, the garment industry, the distribution trades, and finance.

After about a year with the N.R.A., I transferred to the first National Labor Relations Board. This was in August, of 1932, and I—

Q. Excuse me; you said August, 1932. A. 1934, pardon me. I was on the legal staff of the first National Labor Relations Board, and then the successor Board, which is now the present National Labor Relations Board, until the middle of 1936.

I then transferred to the Social Security Board, where my title was Principal Attorney, and I was in charge of

the legislative amendments and matters of drafting new legislation for the Social Security Board. I was at that board for a year.

In the middle of 1937 I transferred back to the National Labor Relations Board. I became Assistant General Counsel and later Associate General Counsel of the National Labor Relations Board. My function was as head of the review division of the Board, which assisted the members of the Board in the preparation of their decisions.

In December, of 1940, I resigned from the National Labor Relations Board, and shortly thereafter I became Special Assistant to the Attorney General in the Department of Justice. I was assigned to what was then the Assistant Solicitor General's office, and remained there for approximately six months.

In June or July, of 1941, I became Assistant General Counsel of the Office of Price Administration. I remained —pardon me, I became Associate General Counsel of the Office of Price Administration. I remained in that position for a year, or approximately more, and then my title was changed to—it was actually a new position—Deputy Administrator, in charge of enforcement for the Office of Price Administration.

In August, of 1944, I became General Counsel of the Office of Economic Stabilization. I remained in that position for a year.

I then moved up to become General Counsel of War Mobilization and Reconversion in August, of 1945.

I resigned from the government to accept the appointment at Yale in 1946, and actually began work at Yale in September, of 1946.

Q. Now, in your almost fourteen years at Yale, what has been the major field of your teaching work? A. My major field of research and teaching has been the public law field. I have taught courses in constitutional law, administrative law, legislative process, and similar areas in the public field.

Within that general area of public law, I have concentrated on political and civil rights. I have done most of my research and writing in the field of political and civil rights, and I have taught a course in that field since the fall of 1947.

Q. Have you done any writing in that field which has been published? A. Yes; I am co-author with Professor David Haber, now of Rutgers University Law School, of a book entitled Political and Civil Rights in the United States. This is a book of cases, other materials, comments, and references dealing with the subject of political and civil rights in the United States. It was first published in 1952, and a second edition was published in two volumes in 1958.

I have also written a number of articles for legal periodicals in the field, as well as book reviews and popular articles.

Q. Do you keep a continuing file on the subject of political and civil rights? A. Yes. Since my coming to Yale I have maintained a rather extensive file of clippings, articles from periodicals, reports, pamphlets, (222) briefs, books, and so forth. I use this file rather extensively in my research and teaching in the field, and keep it up to date.

Q. Have you done any work abroad in connection with your study of political and civil rights? A. Yes, in 1953 to 1954, during that academic year, I was awarded a Guggenheim fellowship for the purpose of studying civil liberties in Great Britain. I went to London, where I was a visiting professor at the London School of Economics for that academic year. I taught a course there in American constitutional law, and participated in a course on administrative law, but most of the time I was engaged in the study of civil liberties in Great Britain, particularly related to the loyalty security program of the government, and the various methods by which the government, labor unions, political parties, and others, dealt with the Communist problem.

Q. While you were in England, did you do any public

speaking on this subject? A. Yes; I gave a public lecture at the University of London on the subject of legislative investigating committees. And I also made an address over the British Broadcasting Company network on the same subject.

Q. Have you received any other fellowships? A. Recently I received a fellowship from the Ford Foundation for the next academic year. This fellowship is for the purpose of studying the legal foundations of the right of political expression.

Q. Can you describe, briefly, the nature of the work you do at Yale, with specific reference to the contacts you have, outside the formal teaching contact with students, and other faculty members at Yale, if they exist elsewhere? A. Well, in addition to the classwork, the political and civil rights course requires that each of the students taking the course must prepare a paper dealing with some subject of civil liberties. In other courses, also, papers are required. And I work rather closely with students in the supervision of these writing projects.

There are other faculty members, of course, on the Yale faculty, who are interested in the same fields, and we constantly discuss these problems.

I also lecture, have given lectures both at Yale and the New Haven community, and at other places, on various aspects of civil liberties.

Q. Have those other places included other academic communities? A. Yes; I have lectured at Harvard, Princeton, Columbia, Bard College, Sarah Lawrence, and various other institutions. Those lectures, I should say, were not always sponsored by the college itself, but some of them were sponsored by student groups or other organizations within the college.

Q. In the course of your work in this field, have you familiarized yourself with the activities of the House Committee on Un-American Activities and with its techniques and investigations? A. Yes, I have concerned myself a

good deal with the Committee on Un-American Activities.

Q. I feel that this question is inticlimactic but I assume you are familiar with the decision in the Barenblatt case? A. Yes, I am.

Q. I would like specifically to call your attention to that portion of the Barenblatt case which appears at page 16 of the pamphlet opinion and discusses what the court calls the issue of a balancing by the court of competing private and public interests at stake in the particular circumstances shown.

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Q. Have you an opinion as to the various factual considerations which have to be taken into account in balancing the competing public and private interests at stake in the circumstances here presented?

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A. I will address myself first to the question of the Government's interest in obtaining answers to questions as an aid in framing legislation to protect internal security.

It is important, I think, at the outset to define rather carefully what that interest of the Government is. It is an interest in seeking information with respect to legislation that will protect against overthrow of the Government by force and violence. The Government does not have a legitimate interest in legislation directed against unpopular ideas or unorthodox beliefs or activities designed to change institutions by peaceful and democratic methods. Hence the Government's interest is one in laws such as those dealing with treason, sabotage, espionage, or various forms of the use of force or violence. And it also, of course, has an interest in legislation designed to deal with preparation or attempts for such conduct, but not with the suppression of legitimate political activities.

Now, as to the considerations which, in my opinion, bear upon the weight to be given this interest of the Government, I first call attention to the laws already on the books and existing at the time of the hearing in 1958 dealing with

matters of internal security. There were at that time laws pertaining to treason, insurrection and rebellion, seditious conspiracy, espionage, and sabotage. There was also the Smith Act, which prohibited advocacy of overthrow of the Government by force and violence, or the forming of organizations to do that.

A very important piece of legislation on the books at this time was the Internal Security Act. In Section 4 (a) of the Internal Security Act it is an offense to agree to do any act which substantially contributes to the establishment of a totalitarian dictatorship in the United States.

The Internal Security Act also includes provisions for registration of Communist action and Communist front organizations.

And a third major portion of the Internal Security Act provides detention camps for use in the event of emergency to incarcerate people whom the Attorney General has reason to believe may engage in espionage or sabotage.

There is also the Communist Control Act which, in Section 4, denies to the Communist Party the rights, privileges, and immunities attendant upon legal entities, and in Section 5 makes it unlawful for a person to be a member of the Communist Party, knowing the objectives thereof.

The Communist Control Act also contained provisions which deal with the question of labor. It amended the registration provisions of the Internal Security Act to include a provision that organizations which were infiltrated by members of the Communist Party would be denied certain rights under the National Labor Relations Act.

In addition to this legislation, there is a mass of legislation and administrative regulation dealing with the problem of loyalty security. Those loyalty security programs cover not only all employees in the federal government, but also all employees in industry who have access to classified materials.

There are a number of additional programs, including that covering dealing with port security, covering maritime

workers, and programs such as that in the Aid of Education Act, which requires a loyalty oath from students accepting scholarship aid furnished by the federal government.

Likewise, among the statutes that have to be taken into account here is the Taft-Hartley Act. As the Taft-Hartley Act existed in 1958, it contained a provision requiring all officers of labor organizations to file a non-Communist affidavit if the organization was to obtain the benefits of the National Labor Relations Act. That has since been amended, but I take it that the amendment is not relevant. The amendment makes it unlawful for a union with officers who have been Communists for the past five years to obtain the benefits of the National Labor Relations Act.

There are other statutes, including those relating to aliens, and there are, of course, a mass of state and local statutes dealing with this issue.

Thus the interest of the Government in obtaining answers to these questions must be weighed in and related to this large mass of legislation dealing with these problems already in existence.

Secondly, any consideration of the Government's interest in obtaining an answer to these questions, in my opinion, must also consider the economic, political, and social conditions in the country at the time, so far as they pertain to the issue of whether there was any danger or threat to internal security. This, in my judgment, would have to take into account that from an economic point of view the country was in a period of almost unparalleled prosperity, that production was high, employment was high, and wages and income were all at peak levels. The standard of living in the country during that period was also at an unusually high level. Certainly there was no indication on the part of the Government or of experts that there was any likelihood of economic collapse or depression, and there were many measures designed to avoid such an economic condition.

With respect to political factors, the situation is, or was at that time, and still is, that there is no significant political opposition to the major parties in this country. There are no radical political movements of consequence, with any large membership or support. As a matter of fact, there are relatively few even protest groups at the present time. There is little support for radical ideology of either a Socialist or Communist nature. In other words, the conditions which would be required for any possibility of danger to internal security were not present politically. It would politically be most unlikely that there would be any danger to national security unless the police force, federal, state, and local, were shown to be infiltrated, or in sympathy with, or at least indifferent to, a radical movement proposing the use of force and violence. In addition, it would require that the military be in support, or at least neutral, and it could only constitute a threat to internal security if there were widespread public opposition to the Government, considerable bitterness, hopelessness, a feeling or conviction that existing institutions were inadequate to deal with the problems the country faced. None of those conditions existed. As a matter of fact, the strength of American political institutions was, I think recognized by all. It had been demonstrated in two wars and a devastating depression, and continued amid considerable unrest in other countries. Those political institutions had proven themselves flexible to deal with the wars and depression, and the general feeling certainly was that they were flexible and adequate to deal with problems then existing.

So far as social conditions were concerned pertaining to internal security, there was no serious social unrest of any kind in the country. On the contrary, there was general acceptance of the social system; certainly no inclination on the part of anyone to use force or violence to solve social problems.

The only possible areas of disaffection that one might point out would be the farmers, who were suffering some-

what economically. That, however, would not seem to be a serious problem. Farmers are notoriously conservative and certainly not of a mind to use methods of force and violence for overthrow of the Government. Farmers have used force and violence on occasion, but that has been local in effect. It is unlikely that any general threat would arise from that course.

Negroes in the south might be considered another source of social disaffection, but they had given every indication of solving their problems through legal methods, as well as through peaceful methods, or passive methods.

Certain white groups in the south might also be considered disaffected, perhaps. They have resorted to force and violence on occasion, but that has been of a local nature, not one which seriously threatened the national security.

Thirdly, one must take into account, in appraising the Government's interest here, the strength of the Communist Party, the organization and movement against which the legislation was presumably directed.

In 1958 the Communist Party membership was at the lowest ebb in many years. According to the F.B.I. figures, it had been in 1952 31,000, and in 1956 it had dropped to 20,000. The F.B.I. does not appear to have issued figures after 1956, but it is clear that by 1958, when the Communist Party had felt the repercussions of both the revelations with regard to Stalin and the Hungarian revolution, that its membership was considerably below 20,000. In 1958 it was undoubtedly less than 10,000 perhaps 5,000.

In terms of political strength, the Communist Party had not been on the ballot since 1940, at which time it obtained 49,102 votes throughout the country. No member of the Senate, no member of the House of Representatives, no member of any state legislature, no mayor, or member of a city council, so far as I am aware, was a member of the Communist Party.

With respect to positions of influence in the country, I take it that it would be accepted by everyone that the Communist influence was not felt in the federal judiciary or in the state judiciary.

With respect to the federal executive branch of the government, the Hatch Act had since 1939 prohibited Government employees from being members of organizations which advocated overthrow of the Government by force and violence, and which had been interpreted to apply to the Communist Party by the Civil Service Commission. In addition, an elaborate series of executive orders, including the one issued by President Truman in March, of 1947, and the one issued by President Eisenhower in April, of 1953, established broad programs for checking the loyalty of Government employees. And President Eisenhower and Attorney General Brownell, as far back as December, 1953, had stated that there were no further Communists in the federal government.

There were three investigations by congressional committees in 1955 with respect to this question, and the evidence there all disclosed no members of the Communist Party or Communist influence in Government service.

State and local governments were subject to loyalty programs of a similar although not always perhaps as intensive a nature, and there is no evidence that any Communist influence existed in state or local government.

In industry, I know of no evidence that there was Communist penetration of any significance. The same is true of agriculture.

With respect to labor, there is evidence that there was Communist influence in some unions in the period after the war, but that now appears to be very small. The Taft-Hartley Act, passed in 1947, required that all union officers file a non-Communist affidavit, and most all of the union officers did that. In addition, there was action by the unions themselves. Three of the unions that were claimed to be subject to left wing influence changed their leader-

ship, and ten others were expelled by the C.I.O. in 1949 and 1950. The C.I.O. also set up rival unions to take over the organization of employees in those areas. By 1951 Mr. J. Edgar Hoover, chief of the F.B.I., complimented the labor movement upon the excellent job it had done in cleaning out Communist influence.

The situation today I would say is that those unions remaining which have anything which can be claimed to be left wing leadership include less than one per cent—the unions generally. I would say also that the influence is in the leadership, not in the rank and file, and in any event those unions have confined themselves to union matters, and not to political matters. There is no evidence, that I know of, of substantial Communist influence in the steel union. Generally speaking, the labor movement has been a relatively conservative force in American society today.

Other areas in which it has been claimed that Communists exercise positions of influence are the communications industries, but I think that claim is no longer made and was not made by 1958. In any event, there was no evidence, even if there were isolated Communists in the communications industries, that they influenced the product.

With respect to religious institutions, there have been some assertions recently that Communist influence was of some significance there, but I think that, despite the position of the Committee on Un-American Activities on that issue, most students of the problem would say that there is no significant Communist influence in religion or religious institutions.

With respect to educational institutions, my judgment would be that Communist influence is about zero at the present time. Virtually all universities have announced the policy that they will not permit members of the Communist Party on their faculties. The secondary and elementary school systems are in almost all states governed by loyalty programs for teachers which exclude Com-

munists and go beyond that. The various educational associations, including the National Educational Association, have, with the exception of the American Association of University Professors, taken the position that the Communists should not be allowed to teach. A recent study by Iversen of Communist influence in education supports this view.

Finally, with respect to Negroes, the Negro community, the House Committee on Un-American Activities has itself stated that there is no substantial evidence of Communist infiltration or influence there, and this is supported by studies published in 1951 by Professor Wilson Record and Professor William Nolan of Communist influence in the Negro community.

In addition, with respect to the strength of the Communist Party, the F.B.I. has consistently stated that it maintains surveillance over members of the Communist Party and follows their activities.

There have been statements that although the Communist Party membership may be low there are a number of fellow travelers for each hard core Communist and that this may present a problem. There is certainly no evidence as to the number of persons who might be included in that indefinite category of fellow travelers, but even if there were, it is quite clear that persons in such position are not ready in any sense to deal in matters of force and violence. Whatever support they may give to positions which the Communist Party also supports is entirely within the democratic framework.

Now, fourthly, as to the Government's interest, in my judgment there must also be considered, in weighing the interest of the Government in obtaining information for further legislation, the factor of the control of Communist influence in the labor movement by the labor movement itself. I have already referred to some facts with regard to this, and I will just add certain additional ones.

The American Federation of Labor-Congress of Industrial Organizations' constitution contains provisions

directed toward preventing Communist influence in labor unions that are affiliated with that organization. In addition, the AFL-CIO has promulgated a code of ethical practices with respect to racketeers, crooks, Communists, and Fascists, which requires that affiliated unions insure, through their constitutional and administrative measures, that no one representing Communist influence hold office or influence policy.

In addition, it should be pointed out that forty unions have constitutions which make Communist Party members ineligible for membership in the union, those unions representing six million employees. There are fifty-nine union constitutions which make Communist Party members ineligible for holding office, those unions representing ten million employees.

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Q. Will you proceed, Professor Emerson? A. There are only two further matters that I wish to point out in connection with the considerations which go into account as to Government's interest.

Finally, I point out that it would be possible for the Committee to obtain substantial information on the basis of voluntary testimony—as a matter of fact, most of its information that it has obtained has come from voluntary sources—and that therefore the necessity of recourse to compulsory testimony becomes less significant.

That concludes my statement of the considerations that must be taken into account with respect to the Government's interest.

I now turn to the other side of the scales and consider the interest of the individual in freedom of speech and the interest of society in freedom of speech.

Let me first point out, with respect to these interests, the nature of the interest involved.

First, as to the interest of the individual: First of all is the interest of the individual in his right of expression. He, as a person, as an individual, as a human being, has

a right to realize himself by expressing his views, his ideas. Such freedom of expression is essential to individual integrity and dignity and the right to develop and realize one's potentialities. This as the primary basis of the individual's interest has I think been recognized by all writers who have commented on the right of political expression. One finds it originally in Milton, and also given expression by Jefferson, Mill, Professor Chaffee, Justices Holmes and Brandeis, and many others.

This significance of individual expression has been, I think, confirmed by psychological and sociological findings in recent years, embodied in the writings of such persons as Erich Fromm, Rollo May, David Reisman, and others. These writers deal with a major problem of contemporary society, perhaps the basic problem, what they call the problem of alienation, that man in modern society feels a stranger to his community; that he doesn't really feel himself a part of society, and that he is controlled by impersonal forces; that this feeling is the basis of the malaise of the present civilization.

It seems to me that the implication of this is that in order for a man to be an integrated, healthy, mature person, he must be free to express himself, and to live his own life, and I think these psychological findings support that basic right of individual expression.

Again, the individual has also a right of silence, a right not to be forced to speak. This was a right which was recognized in the classic flag salute case. It has been discussed by Justice Brandeis as a right of privacy. It is a right that is essential to human dignity, the right, again, to live one's own life. And I think that this right of silence, the right not to be forced to state one's beliefs, opinions, or associations, is particularly important in modern society when so many pressures tend toward conformity, and the individual finds it much more difficult, in view of the deprivations against unorthodoxy, to maintain his own independent existence.

Finally, with respect to the interest of the individual, it involves also the right of association, the right to associate with others. This was a right which was won more gradually than other parts of the right of free expression, but I think is now generally recognized. It is based on the weakness of the individual as a single person to accomplish political or social change and the importance of an organization in which he can participate. In a sense, the right of association is complementary, one might say, to the right of silence. A man must both live alone and live with others.

Now, as to the nature of the interest of society in freedom of political expression, society's interest in free expression is a basic and absolutely fundamental principle of the democratic process. It rests upon the whole basis of our democratic institutions, namely, that the people are the sovereign power in our form of government; that the Government and its members are servants of the people, who have and continue the sovereign power. It is therefore the people who make decisions through the Government, and the Government that carries them out, but the ultimate right of decision rests with the people of the country as a whole.

If this be accepted, and it is commonplace as our view of our democratic society, it is then essential to have full discussion of all matters on which the people may be called upon to make judgment, and this right includes not only the right to speak ones self, but also the right to hear the views of others. The only alternative to a system of full and open discussion of this sort is a system of resolving questions by force. That of course is not part of our democratic system.

Not only is the right of expression a fundamental part of a democratic society, but it is also, as Mill particularly has pointed out, necessary to a healthy functioning of society. Every society, as he indicated, requires criticism, requires opposition, requires challenge, to its most basic assumptions, as well as to matters which are more on the

surface. Otherwise in a society, the reasons for certain positions, even if those reasons are correct, become less sharp, and become forgotten, so that we accept our principles and our way of doing things purely because it has been done in the past, without knowing or understanding the basis on which we act. Such a society becomes very vulnerable to change and inflexible, unable to adapt itself to changes. It is therefore necessary to have the fullest and most open kind of expression.

This is, then, the nature of the interest on the other side of the scales.

I turn now to considerations which should be balanced, which should be taken into account, in appraising that interest. This deals mainly with the impact of committee investigations of political ideas, beliefs, associations, and activities, the impact of such investigations on the right of the individual and the right of society to free expression.

The effect on the individual, as I think is now well recognized, is most serious. The harassment of calling an individual before an official body, such as a committee, and putting questions to him, often in a hostile way, certainly is an experience which many people do not wish to undergo, and the mere process of calling and questioning, particularly, as is true in this case and in many other cases, where the questions are with respect to ideas or activities that are exceedingly unpopular, the impact of that is a very serious one on the individual's willingness to express himself.

There are also most important economic repercussions on witnesses who have been called before committees. Many industries have policies of discharging persons who do not act in certain ways before legislative committees. It may be that a career in a profession or an academic career is not possible after a committee has extracted material with respect to one's political beliefs or associations. Certainly one's political influence declines. No one

listens to what a person says who has been branded by the Committee as a member of the Communist Party or influenced by Communist ideology.

There is also social stigma. On gets telephone calls at night, and one's friends avoid one in the situations, all of which means that the Committee exercises a tremendous impact upon any individual who is forced to reveal, over his objection, his political ideas or associations.

It is, furthermore, not only the impact on the individual who is called before the committee that is important, but the impact upon others. Perhaps this is even more important, because there are many more others, and because the others are less likely to be of the same temper as those who were sought out by the committee, that is to say, they are perhaps more timid or uncertain about expressing themselves or engaging in political activity. In any event, the impact spreads throughout the whole country and throughout the whole area of political activity and association.

One particularly important aspect of this is the effect on the right of association. Persons become fearful of joining associations which may later be attacked by a legislative committee. They become fearful of joining associations which may have in them people who will be subject to attack by a legislative committee. And consequently, since one cannot tell in advance what positions an organization will take, or what members it may have, the only recourse is to avoid joining organizations altogether, and this tends to be one strong impact of the committee, that it sharply curtails freedom of association.

It should be emphasized, also, that it is impossible to confine the impact of the Committee to the Communist Party or to matters closely or entirely related to the Communist Party. The Committee does not and cannot really draw a hard and fast line between Community Party Activities and other activities which look as though they might be Communist Party activities or other

activities which may coincide with Communist Party activities. There is swept into the net the whole area left of center, one might say, and it all becomes smeared, as it were, with the same color, although it may not be what the Committee claims it is after. Such a blurring of lines is inevitable in any administrative organization, and the Committee has become a fairly large administrative organization, with its staff. The whole dynamics of an operation of this sort means that the impact spreads far beyond the members of the Communist Party. One might say that they are perhaps least affected, in terms of their freedom of association.

I can illustrate these matters by various examples, but I mention only one or two, things of which I have some personal knowledge. One is the impact on students at a university of the activities of legislative investigating committees into political beliefs and associations. My experience has been that students are quite concerned about joining organizations or committing themselves to matters which have been or may later come under attack by committees. They are interested in those problems, but not inclined to be active or committed to their solution.

For instance, in my classes, both in constitutional law, in connection with the Konigsberg case, and in political and civil rights, there has been discussion as to whether members of the Communist Party should be allowed to be members of the bar. I know from the discussion in class, which I think is reasonably open, what the views of the various members of the class on this may be. The majority of them, rather large majority, have at least stated the position, and I think it is their correct position, that whether a lawyer is a member of the bar should not depend upon whether he is a member of the Communist Party but upon the qualifications, the merits. When, however, the students were called before the character committee for admission to the bar, they were asked the question, in many instances, as to whether or not they

believed a member of the Communist Party should be a member of the bar. Many of them, contrary to the view that they had expressed privately, expressed the view that a Communist should not be admitted to the bar. That I think is an indication of the most unfortunate consequences of an attitude for which I think the legislative committees are very largely responsible.

It seems to me a very poor way for a person to enter the legal profession, by being forced to conceal his views on peril of knowing that he will be in difficulties if he does not. And it is that kind of an impact, as well as the impact of being noncommitted and unwilling to participate in the solution of significant problems that I think is quite widespread as the result of inquisitions, or investigations, pardon me, of legislative committees.

I find a very similar feeling in organizations dealing with foreign policy. There are very few, if any, organizations which express a point of view different to the official American State Department view on foreign policy. It is inconceivable to me that there aren't many people who don't agree with our foreign policy, but that does not reflect itself in organizations. And those that I have come in contact with have been particularly concerned about who else might be in the organization or whether it should take a position at all on these matters for fear that its individuals will be harassed and its whole usefulness destroyed by a public investigation.

I will add only one other consideration here with respect to the factors to be taken into account in this balance, and that is, in my opinion, the general balance today between forces pressing toward an open society and those toward a closed society is very much in favor of the latter, generally speaking; that is to say, I think the forces in our society which tend to be restrictive and to suppress independent thinking and activity are greater than those which would encourage independent activity.

In the Government, for instance, not only has the Government taken over regulation of economic and other matters on a very extensive scale, but its loyalty programs have been very extensive and very repressive in their way. It has been estimated that there are in the neighborhood of twelve million persons in the country that are subject to loyalty tests, and that is a constantly moving number, because that is the number at any one time, and that number does not also include the families and dependents of such persons.

The economic organization of our society presses in this direction, too; the large units which leave no room for individuals, mass production methods; similarly, the mass media, the newspapers, radio, television, pound out the same message to us on a rather low level. Educational institutions which should be the ones to counteract to the largest extent this pressure toward conformity do not always do that. They are much too restricted. They fail to deal with controversial issues. The courses teaching socialist or Marxist theory, which is held by a great many people in the world, are few and far between.

In short, it seems to me that as of this time what is needed, in terms of freedom of expression, is that society encourage independence, unorthodoxy, and differences. I think it is essential, if society is to meet the challenges of today and to adjust itself to the rapid changes which are taking place. So that from an overall point of view, it would be important that the courts not take any action which will discourage, rather than encourage, forces for an open society.

Q. Professor Emerson, in your opinion, in view of the facts that you have stated, in whose favor should the balance be struck between the various interests here at stake?

A. My answer is, on the basis of the foregoing considerations, it is my opinion that the interests of the Government in obtaining answers to the questions put to

this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interest of the individual in freedom of speech or silence, as he may prefer, and by the interest of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society.

[fol. 119] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,779

BERNARD SILBER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Columbia

OPINION—Decided June 30, 1961

Mr. Victor Rabinowitz, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom Mr. David Rein was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney at the time of argument, Carl W. Belcher, Assistant United States Attorney at the time of argument, and Miss Doris Spangenburg, Assistant United States Attorney, were on the brief, for appellee.

Before Mr. Justice Reed, retired,* Bazelon and Bastian, Circuit Judges.

[fol. 120] BASTIAN, Circuit Judge: This case is a companion to *Grumman v. United States*, No. 15,747, decided today. Appellant, like Grumman, was called to testify before a subcommittee of the House Committee on Un-American Activities during a series of hearings on communist infiltration into the communications industry.

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* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

Appellant was called on August 2, 1957. At the commencement of proceedings on that day, and in the presence of appellant, the subcommittee chairman, Mr. Clyde Doyle, made the following statement:

> "This morning's hearings are a continuation of previous hearings started on July 17, 1957, this being a continuation of a series of hearings in the communications industry in the United States, namely, the position and influence held by members of the Communist Party and organization dedicated to the Communist objectives in that field of communications industry, principally.
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> [Mr. Doyle then read into the record the resolution of the full committee authorizing the hearings currently in progress. The language of that resolution is quoted in Grumman.]
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> "[In] these hearings, the second of a series on this general subject, the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications.
>
> "In the event that testimony given during these hearings reflects a situation correctable by legislation or which may be remedied by legislation, the committee will recommend the appropriate measures at the proper time."

In response to questioning by a staff member of the committee, appellant testified that he had been a member of the Communist Party some years previously, and that [fol. 121] in his work for Western Union Telegraph he handled Government coded messages. He refused to name the person who had recruited him into the Party and refused to state whether he knew any communists presently in the industry. The exact questions forming the basis of the indictment are as follows:

Count One: "Was he [the person who recruited defendant in the Communist Party] a communications worker?"

Count Two: "We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists."

Count Three: "Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?"

Count Four: "Were any of the present officers of your union members of the Communist Party at the time you were in the Party?"

When appellant declined to answer these questions,[1] referring to the statement of objections filed by Grumman, the pertinency of the questions was explained to him as follows:

> "Mr. Arens [Counsel for Committee]: Mr. Chairman, I respectfully suggest that I be permitted to explain to the witness why it is pertinent to this inquiry for us to insist that this witness tell us whether or not the person who recruited him into the Communist Party was at that time in the communications field as a communications worker.
>
> "Now, Mr. Witness, this committee is considering legislation to safeguard this Nation from possible espionage or sabotage facilities by Communists.
>
> "If the person who enlisted you into the Communist party was engaged in the communications field, [fol. 122] that person undoubtedly would have some information which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country.
>
> • • • • •

[1] Appellant, like Grumman, did not urge the Fifth Amendment.

> "If you do have such information and if we can get the names of those people and if we can get them to testify, we will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation."

The pertinency of the specific questions forming Counts Three and Four of the indictment was explained to appellant by Mr. Gordon H. Scherer, a committee member, as follows:

> "[T]hose questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced."

At the trial in the District Court, Count Two of the indictment was dismissed on motion of appellant. He was convicted on the remaining three counts and was duly sentenced. This appeal followed.

Richard Arens, the committee counsel, testified at the trial that appellant was called to testify before the committee on the following basis: (1) his name appeared on a list given the committee by Western Union Telegraph of its employees who, in their work, had access to Government coded messages; (2) the committee files listed appellant as a member of the American Communications Association [as stated in Grumman, testimony before the committee had identified certain officers of that Association as communists]; and (3) a New York Times article published in 1940 contained an account of union litigation in which it was alleged that appellant was a "Red."

We have already decided, in *Grumman*, that the subcommittee's investigation of the subject was authorized by Congress; that the subcommittee was pursuing a valid [fol. 123] legislative purpose in conducting this investigation; and that the subcommittee's interrogation in the course of its investigation in the communications field did

not violate First Amendment rights of free association and free speech.

We think the questions asked appellant were clearly pertinent to the subject matter under investigation. It is difficult to imagine questions more pertinent to an effort to discover the identity of persons possessing the very information the committee sought. We think, too, that the explanation of pertinency given appellant made that pertinency clear beyond any doubt. In such circumstances, appellant's refusal to answer amounted to a refusal to identify to the committee persons who might possess up-to-date knowledge of the details and extent of communist conspiracy in the industry under investigation, and a refusal, in effect, to state even whether or not such a conspiracy existed.

Appellant further complains of the exclusion by the trial court of his proffered expert testimony on the question of "balancing" the interest of the Government in eliciting the testimony sought against the First Amendment rights asserted by the witness. This "balancing" is strictly a matter of law for decision by the court and, therefore, "expert" testimony is irrelevant.

Appellant seeks to distinguish this case from *Wilkinson* v. *United States*, 365 U.S. 399 (1961), and *Braden* v. *United States*, 365 U.S. 431 (1961), on the ground that the committee lacked probable cause for calling him inasmuch as he was not identified by prior witnesses as a communist. Calling him in such circumstances, he contends, amounts to an "indiscriminate dragnet procedure." See *Barenblatt* v. *United States*, 360 U.S. 109, 134 (1960).

We know of no requirement that a prospective witness actually be named as a communist by a prior witness before he may legally be called by a congressional investigating committee. Certainly the committee had probable cause [fol. 124] to inquire whether appellant was a communist. His affirmative answer to the questioning as to party membership in and of itself was sufficient to induce the committee to seek from him the information it wanted. This, we think, is what the Supreme Court meant, in *Wilkinson*, when it said: "Indeed, it is difficult to imagine a preliminary question more pertinent to the topics under investiga-

tion than whether petitioner was in fact a member of the Communist Party."

In accordance with our action in delaying decision in *Grumman*, we delayed decision in this case, which, like *Grumman*, is readily distinguishable from *Deutch* v. *United States*, decided June 12, 1961. As in *Grumman*, the questions asked of appellant here were clearly pertinent to the subject under inquiry and in no way represented an excursion beyond the announced purpose and scope of the committee's inquiry.

We have examined the other contentions of appellant and find no error.

Affirmed

BAZELON, Circuit Judge, concurring in the result: Two principal grounds of error are raised on this appeal: (1) that the questions which appellant refused to answer, relating to the names of other persons associated with him in political activity, were not pertinent to the congressional inquiry; and (2) that there was no showing of probable cause sufficient to justify the issuance of a subpoena to appellant. I agree that the first contention must be rejected if we are to consider the question of pertinency to be resolved without reference to First Amendment rights. I also agree that the second contention must fail since we are bound by this court's decision in *Shelton* v. *United States*, 108 U.S.App.D.C. 153, 280 F.2d 701 (1960), *cert. granted*, 365 U.S. 857 (1961).

[fol. 12[illegible] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,779

Criminal 753-5[illegible]

BERNARD SILBER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court for the District of Columbia.

Before: Mr. Justice Reed, retired, and Bazelon and Bastian, Circuit Judges.

JUDGMENT—June 30, 1961

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated: June 30, 1961.

Separate opinion by Circuit Judge Bazelon concurring in the result.

[fol. 126] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 15,779

BERNARD SILBER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING—Filed July 14, 1961

The undersigned hereby petitions this Court for a reconsideration of the judgment of affirmance in the above entitled matter.

The reasons for this petition are as follows:

Appellant attempted, in this appeal, to present to the Court some of the problems which must be faced if our courts are to adhere to the balancing doctrine announced in *Barenblatt* v. *United States*, 360 U. S. 109, 126, and applied in subsequent cases. We respectfully submit that in disposing of the appellant's argument in a single paragraph in its opinion (Slip Opinion, p. 5*), the Court failed to do full justice to the problem presented, and overlooked some of the issues we sought to raise in our brief.

Appellant raised in his brief to this Court two separate arguments addressed to the balancing doctrine.

1. The first, set forth in Point IV of the brief, related to the action of the District Court in excluding from the record the proffered testimony of Professor Emerson. We [fol. 127] respectfully suggest that the language of the Court in the *Barenblatt* case, in making reference to "the particular circumstances shown" (at p. 126), must be referring to a question of fact and not to a matter of law. Obviously, the "circumstances" will vary from case to case and we do not believe that the language of the court

* Printed herein at side folio 123.

in *Barenblatt* is susceptible of the interpretation placed upon it by this Court in its opinion.

As a matter of fact, where the Supreme Court has, since *Barenblatt*, applied the balancing doctrine, it has done so on a factual basis. See, for example, *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 656; *Louisiana* v. *N.A.A.C.P.*, October Term 1960, No. 294.

We should like to point out further that in considering the application of the due process and contract clauses of the Constitution, the Supreme Court has always weighed the facts in determining whether government regulation of free enterprise was justified by the greater interest of the national security. *Muller* v. *Oregon*, 208 U. S. 412; *Nebbia* v. *New York*, 291 U. S. 502. If such facts can be judicially noted, certainly they can be presented by testimony, by experts or otherwise.

Even assuming that the testimony of Professor Emerson was not admissible, still appellant urges that in this particular case, when a balance is struck, it must be struck in favor of the appellant, and hence requires an acquittal. This Court did not even consider this argument which was made in Point V of appellant's brief.

Obviously, if a balance is to be struck, there are circumstances in which individual rights will be found to outweigh the rights of the government to investigate and, indeed, as is noted above, the Supreme Court has on a number of very recent occasions struck such a balance in favor of a recalcitrant witness. We respectfully submit that on the facts in this case, too, such a balance must be struck in favor of appellant.

[fol. 128] As we noted in our original brief, this is not the first hearing devoted to a discussion of alleged Communism in the American Communications Association—indeed, similar investigations have been carried on periodically ever since 1951 (see hearings listed at page 13 of appellant's brief). Many hundreds of pages of testimony have been taken on the subject and hundreds of persons have been named as allegedly having been members of the Communist party while employed in the communications industry. The additional bit of testimony which the appel-

lant could have given, referring as it must to many years in the past, would carry so little weight as to be quite insignificant when measured against the Constitutional right he has to remain silent—a right recognized frequently by this Court.

In these circumstances, the interest of the Committee in getting the answers it sought from appellant was miniscule. Absent First Amendment considerations, such answers might have been required, but, when weighed in the balance against the very substantial First Amendment rights at stake, the interest of the Committee cannot be considered sufficient.

For these reasons, the Court is respectfully requested to reconsider the Judgment of-Affirmance in the above matter and, upon such reconsideration, to reverse the decision of the Court below.

July 20, 1961

Respectfully submitted,

Victor Rabinowitz, David Rein, Attorneys for Appellant.

[fol. 129] Certificate

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Victor Rabinowitz, David Rein, Counsel for Appellant.

[fol. 130] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 15,779

BERNARD SILBER, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

Before: Mr. Justice Reed, retired, sitting by designation, and Bazelon and Bastian, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—August 1, 1961

Upon consideration of appellant's petition for rehearing, it is

Ordered by the court that the petition is denied.

Per Curiam.

Dated: Aug. 1 1961

[fol. 132] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 133]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1961

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 17, 1961

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1961.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of August, 1961.

[fol. 134]

SUPREME COURT OF THE UNITED STATES

No. 454, October Term, 1961

BERNARD SILBER, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 4, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 436.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 135]

GOVERNMENT'S EXHIBIT 4

[Stamp—Filed—June 3, 1960—Harry M. Hull, Clerk]

Ralph R. Roberts
Clerk

OFFICE OF THE CLERK
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

I, Ralph R. Roberts, Clerk of the House of Representatives, do hereby certify that the attached is a true and correct copy of House Report 1241 of the Eighty-fifth Congress, first session, as submitted to the House of Representatives August 23, 1957, by Mr. Walter, of Pennsylvania, from the Committee on Un-American Activities and noted in the Journal of the House of Representatives of August 23, 1957, Eighty-fifth Congress, first session.

[SEAL]

In witness whereof I hereunto affix my name and the seal of the House of Representatives in the City of Washington, District of Columbia, this twenty-fourth day of August anno Domini one thousand nine hundred and fifty-seven.

/s/ RALPH R. ROBERTS
Clerk of the House of Representatives

[fol. 136]

* * * * * * *

PROCEEDINGS AGAINST BERNARD SILBER

* * * * * * *

[fol. 137] Mr. SILBER. It had no real name, no designation for it of any kind.

Mr. ARENS. Who enlisted you in the Communist Party?

* * * * * * *

[fol. 138]

GOVERNMENT'S EXHIBIT 7

Union Calendar No. 534

85th Congress, 2d Session - - House Report No. 1360

[Stamp—Filed—June 3, 1960—Harry M. Hull, Clerk]

COMMITTEE ON UN-AMERICAN ACTIVITIES

ANNUAL REPORT FOR THE YEAR 1957

[Insignia]

FEBRUARY 3, 1958

(Original Release Date)

FEBRUARY 19, 1958.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Prepared and released by the

Committee on Un-American Activities,
U. S. House of Representatives
Washington, D. C.

[fol. 139]

• • • • • • •

OMNIBUS SECURITY BILL

THE INTERNAL SECURITY AMENDMENTS ACT OF 1958 (H. R. 9937)

The work of the committee over the past years has revealed extensive inadequacies in anti-Communist legislation. During the last session of the Congress the chairman of the committee introduced a comprehensive omnibus security bill, H. R. 9532, to strengthen the hand of the Government in dealing with a wide range of Communist operations.

This omnibus security bill was refined and revised by a new bill, H. R. 9937, introduced by the Chairman on January 13, 1958. It is entitled "The Internal Security Amendments Act of 1958" and amends the Internal Security Act of 1950 by—

(1) Precluding abatement of proceedings before the Subversive Activities Control Board by reason of the dissolution, reorganization, or change of name of a respondent organization. The purpose of this amendment is to counter the Communist technique of changing the name or formal, technical structure of an organization in order to avoid the consequences of an adverse finding by the Subversive Activities Control Board.

(2) Making it a misdemeanor for any person to misbehave before congressional committees.

(3) Prohibiting Communist lawyers from practicing before executive departments and congressional committees.

(4) Redefining the term "organize" (as used in the Smith Act). The purpose of this amendment is to overcome the effect of the decision of the Supreme Court in the Yates case which contrued the term "organize" to mean only the original formation of a group.

(5) Permitting the enforcement in State courts of State sedition statutes. The purpose of this amendment is to overcome the effect of the decision of the Supreme Court in the Nelson case nullifying State sedition statutes.

(6) Protecting the security of confidential Government files. During the 1st session of the 85th Congress, Public Law 85-269, was enacted in an attempt to overcome the effect of the decision of the Supreme Court in the Jenck's case and the Court of Appeals decision on the Subversive Activities Control Board's opinion in the case of the Communist Party. Public Law 85-269 is applicable only to [fol. 140] criminal cases, whereas the amendment in the omnibus security bill is applicable to any proceeding (i. e., income tax, claims cases) as well as criminal proceedings in which confidential Government files may be subject to disclosure. Under Public Law 85-269, moreover, the test of admissibility is relevancy, while under the omnibus security bill the test of admissibility in the first instance is whether or not the security of the United States would be jeopardized.

(7) Permitting, under safeguards, disclosure of certain intercepted security information.

(8) Prohibiting the unauthorized disclosure of certain defense information.

(9) Making it an offense to use a false name for the purpose of procuring employment in defense facilities.

(10) Extending the statute of limitations for certain seditious and subversive activities.

(11) Expanding the provisions of the Foreign Agents Registration Act by—

(*a*) Bringing within the coverage of the definition of "foreign principal" an organization which is "supervised, directed, controlled, or financed, in whole or in part, by any foreign government or foreign political party," regardless of whether the organization is supervised by a foreign goverment.

(*b*) Including within the registration requirements of the Foreign Agents Registration Act persons who have used the existing exemption for certain commercial activities to disseminate propaganda.

(*c*) Eliminating cumbersome criteria pertaining to the form of political propaganda subject to the provisions of the act.

(*d*) Establishing in the Bureau of Customs an office of a comptroller of foreign propaganda and fixing responsibility for the control of foreign political propaganda.

(12) Permitting immigration officers to be detailed for duty in foreign countries and empowering such officers to exercise certain functions with respect to issuance of visas.

(13) Permitting the detention and supervision of certain aliens under order of deportation.

(14) Requiring the Attorney General to report to the Congress certain waivers in the administration of the immigration laws.

(15) Canceling naturalization procured illegally, by concealment of a material fact or by willful misrepresentation.

(16) Revoking citizenship to one who becomes a part of the official apparatus of a Communist country without the consent of the United States Government.

(17) Strengthening passport security and travel control by—

(*a*) Prohibiting travel in violation of passport regulations even though there may be no technical state of war.

(*b*) Precluding the issuance of passports to persons concerning whom there is reasonable ground to believe that they are going abroad for the purpose of engaging in activities which will further the aims and objectives of the Communist Party, or other subversive groups.

(*c*) Authorizing the withholding of passports to persons whose activities abroad would violate the laws of the United States, be prejudicial to the orderly conduct of foreign relations or be prejudicial to the interests of the United States.

[fol. 141] During the coming year it will be the purpose of the committee to call a number of witnesses who are known to have in their possession information and documentation relating to one or another of the sections of the proposed omnibus bill.

• • • • • • •

[fol. 142]

SECTION V

COMMUNIST PENETRATION OF COMMUNICATIONS FACILITIES

An immediate danger to national security lies in the continuing penetration of the Nation's communications facilities by potential Communist spies and saboteurs.

This was established clearly in hearings by the Committee on Un-American Activities on July 17, 18, 19, August 2, and October 9, 1957. Continuing investigation by the committee has disclosed further that the Communist apparatus has been able to infiltrate key segments of the Conelrad enemy warning system, established to alert the civilian population in a target area.

In the course of the hearings, the committee ascertained that the National Labor Relations Board continues to recognize the American Communications Association as the representative of communications workers servicing key communication lines of a number of vital United States Government agencies, including the Department of Defense. The American Communications Association was expelled from the CIO on June 15, 1950, because of its domination by Communists. Officers of the union who have been identified as members of the Communist Party include Joseph P. Selly, president; Joseph Kehoe, secretary and treasurer; Dominick Panza, international vice president; and Charles L. Silberman, editor of ACA News.

J. L. Wilcox, a vice president of the Western Union Telegraph Co., testified that approximately 4,200 of the employees of Western Union were represented by the American Communications Association.

During the course of the October 9 hearings, the committee interrogated William Bender, vice president in charge of the broadcast division of the Communist-controlled American Communications Association. Mr. Bender testified that the broadcast division of the American Communications Association had about 100 members and that they had representation in 7 radio stations—WLIB and WBNX, in New York City, WPEN, WIP, WDAS, WIBG, and WHAT, located in Philadelphia, Pa.

Mr. Bender, when asked whether or not he was a member of the Communist Party, denied membership at the time of the hearings but invoked the fifth amendment when asked whether he had been a member of the Communist Party in the course of the past year. Mr. Bender did testify, however, that some of the radio stations represented by the American Communications Association participate in the so-called Conelrad System of air raid defense which, in time of national emergency, will become an integral part of our defense operations. Mr. Bender refused to divulge the names of persons employed in any of these radio stations who, to his certain knowledge, are or have been members of the Communist Party.

[fol. 143] The danger inherent in Communist access to communications facilities was described by Adm. Ellery W. Stone, president of American Cable & Radio Corp., in these words:

> • • • If an operator were subversively inclined he could make copies of such messages in the normal course of his work, if unobserved, and deliver them to outsiders who could well be expert in decoding and thus bring about a breaking of codes.
>
> • • • • •
>
> There exists, too, actual danger of sabotage on a wide basis, where trained saboteurs are planted throughout any communications company facilities at the outbreak of any hostilities. It would be a simple matter for such employees to cripple communications by damaging delicate and complex equipment, pouring acid on lead-covered cables, for example, which are used in modern methods of message transmission.

Admiral Stone declared further that this threat would be present even if only a handful of Communists were employed in vital communications centers. Regarding ship-to-shore radio installations, Admiral Stone commented in effect that Communists having access to communication facilities pertaining to defense transportation of the United States and our allies, could transmit information to an enemy, thereby creating a danger to the security of the United States.

SOVIET INFILTRATION CONTINUING

A. Tyler Port, Director of the Office of Personnel Security Policy, Office of the Secretary of Defense, stated in his testimony that the Department of Defense has actively supported legislation that would permit the removal of dangerous persons from facilities vital to our Nation's security. He warned, however, that the Department of Defense cannot assure the Congress or the American people that all reasonable measures have been taken to safeguard our national security inasmuch as Communists are still permitted to work in vital communications facilities.

Mr. Port further stated in his testimony that the Defense Department is continuously aware that regardless of what specific international development occurs, infiltration of the defense effort by agents of the Soviet Union is a continuing objective.

(The following is an excerpt from the hearing:)

> Mr. ARENS. Is the record clear, gentlemen, that the Defense Establishment is of the judgment that present law is inadequate to cope with the problem of Communists and their access to the vital communications facilities of the Defense Department?
>
> Mr. PORT. That is correct, Mr. Arens. I might say, if I may, that as the speed, range, and complexity of our modern weapons systems advance, our communications systems on a global basis become increasingly vital to modern military operations.

> Supplementing our own communications facilities international communications industries of this country play a vital role in our national defense effort.

[Fol. 144] Paul Goldsborough, staff director, Communications Division, Office of the Assistant Secretary of Defense (Supply and Logistics), also appeared before the committee and testified that there is a potential possibility of sabotage of communications facilities which process defense messages by any "subversive element that might be so minded."

Michael Mignon, a representative of the Communications Workers of America, AFL-CIO, testified that he had formerly been a member of the Communist Party of the United States. Mr. Mignon pointed out the importance that the Communist Party places upon control of the communications industry in times of emergency. He stated:

> To the best of my recollection, sir, it was always pointed out to me that the importance of obtaining control of the communications industry in times of stress or in revolutionary times was a primary factor, and therefore the efforts of the Communist Party in subsidizing the union and offering whatever assistance they could in building the union in the communications industry was primarily the main objective.

Mark Anthony Solga, employed as a radio operator by the Radio Corporation of America, testified before the committee that he had also been a member of the Communist Party. When asked whether he believed that the employment of Communists in the communications industry constituted a serious menace to the security of the United States, Mr. Solga stated:

> Potentially, I honestly believe that it does. In the event of any further conflict between the East and West, as that tension increases during the so-called cold war, if it should ultimately develop to a stage where it becomes rather hot, then I do honestly believe they are in a potentially dangerous position to inflict harm on our national security.

Samuel Rothbaum, who is employed as an assistant repeater chief by the Western Union Telegraph Co., testified that he had been a member of the Communist Party and that, in his opinion, based upon 22 years of experience in the communications industry, a saboteur could inflict "an awful lot of damage" in time of crisis.

Mrs. Concetta Padovani Greenberg, who has been employed by the Western Union Telegraph Co. since 1927, also appeared as a friendly witness during the course of the hearings. She testified that she had been a member of the Communist Party for a period of years. When questioned regarding the possibility of access to confidential and coded messages by members of the Communist Party, Mrs. Greenberg testified that persons known to her as having been members of the Communist Party do have access to confidential messages transmitted over facilities of certain segments of the communications industry. She stated that she had seen confidential messages relating to the tests made upon the atomic and hydrogen bombs.

Office-Supreme Court, U.S.
FILED
SEP 27 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

VICTOR RABINOWITZ,
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IN THE

Supreme Court of the United States

October Term, 1961

No.

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above case on June 30, 1961.

Opinions Below

The District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals has not been officially reported, and is annexed hereto as Exhibit A. The judgment of the Court of Appeals is annexed as Exhibit B.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1961. Rehearing was denied on August 1, 1961. An extension of time to September 30, 1961 for the filing of this Petition was secured from a Justice of this Court on August 16, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Were the questions which petitioner refused to answer pertinent to the subject under inquiry by the subcommittee?

2. Was there probable cause sufficient to justify the issuance of a subpoena to the petitioner?

3. Did the public interest involved in securing answers to the questions here at issue outweigh petitioner's interest in the exercise of his rights under the First Amendment?

4. Did the District Court err in refusing to permit the introduction of testimony relating to the relative weight of the public and private interests affected by the investigation of the subcommittee?

5. Should the indictment have been dismissed because of the presence of government employees on the Grand Jury?

6. Was the statute under which petitioner was convicted unconstitutionally vague?

7. Was the investigation being carried on by the subcommittee pursuant to a bona fide legislative purpose?

8. Was the investigation carried on by the subcommittee permissible under the First Amendment to the Constitution?

9. Was the resolution establishing the Committee invalid for vagueness?

10. Was the inquiry conducted by the subcommittee within the scope of the resolution creating the Committee?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution.

The statute involved is 2 U. S. C. § 192, which reads as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

Statement

Petitioner was indicted under 2 U. S. C. § 192 for contempt of Congress on four counts (J.A. 2-4). Count two was dismissed before trial (J.A. 10). Petitioner waived a jury and, after trial, was convicted and sentenced to four months' imprisonment and a fine of $100 (J.A. 10-11, 97).

Petitioner was summoned to appear before a subcommittee of the House Committee on Un-American Activities (hereinafter referred to as the "Committee") by subpoena issued June 21, 1957, five days after the decision of this Court in *Watkins* v. *United States*, 354 U. S. 178 (J.A. 14). He appeared on August 2, 1957 and testified, under questioning by Committee counsel, that he was at that time employed by Western Union Telegraph Company, and that he had been so employed for 41 years. In the course of his work he had access to "Government coded messages," but he had no way of telling whether or not they were security

messages (J.A. 24, 25). He said that he had been a member of the Communist Party "for a brief period" in about 1948 but was no longer a member (J.A. 26). He drifted away almost immediately and was never active (J.A. 26). He attended meetings infrequently (J.A. 33, 34).

He was then asked what group of the Communist Party he was a member of. He refused to answer on grounds of lack of jurisdiction of the Committee, his rights under the First Amendment, the vagueness of the resolution setting up the Committee and lack of pertinency. He relied heavily on the decision of the Supreme Court in the *Watkins* case (J.A. 26, 67-71).

The following colloquy immediately ensued:

> "Mr. Scherer: You refused to answer Mr. Arens' question as to the person who recruited you in the Communist Party.[1] You refused to identify that person.
>
> Now, without identifying him or telling us his name, is that person still a member of the Communist Party today?
>
> (The witness confers with his counsel.)
>
> Mr. Scherer: As a communications worker?
>
> Mr. Silber: To the best of my knowledge he is no longer in the industry.
>
> Mr. Scherer: Was he a communications worker?" (J.A. 27, 28).

Petitioner's refusal to answer this last question forms the basis of Count 1.

Counsel for the Committee then stated that if the person who enlisted petitioner into the Communist Party was in the communications field, "that person undoubtedly would have some information of use to the Committee." (J.A. 28).

After further questioning not here at issue, the following colloquy took place:

> "Mr. Scherer: What union do you belong to?

[1] No such question had been asked by Mr. Arens.

Mr. Silber: The American Communication Association.

Mr. Scherer: Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?

Mr. Silber: I must decline to answer that, sir.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline on all the grounds previously stated.

Mr. Scherer: Were any of the present officers of your union members of the Communist Party at the time you were in the party?

Mr. Silber: I must decline for the same reasons. I must decline to answer.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline to answer.

Mr. Scherer: And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced." (J.A. 34)

These two refusals to answer constitute the basis of Counts 3 and 4.

The witness was not asked any questions concerning his own activities in the Communist Party.

Petitioner was indicted on or about August 4, 1958. He moved to dismiss the indictment and for a hearing on the qualifications of the grand jurors, filing an offer of proof in connection with the latter motion (J.A. 3-9). The motions were denied, except that Count 2 was dismissed (J.A. 10).

At the trial the only witness for the prosecution was counsel for the Committee, Mr. Arens. He testified that the Committee caused a subpoena to be issued to petitioner because the Committee had information "that Mr. Silber had been a member of the Communist Party engaged in the communications field" (J.A. 15).

On cross-examination Mr. Arens testified that he had previously been special counsel to the Internal Security Subcommittee of the Senate Committee on the Judiciary and that in 1951 he had conducted an investigation into communism in the communications industry, particularly into the American Communications Association. This was the union of which petitioner was a member and which was the subject of Counts 3 and 4 of the indictment. The witness recalled a "synopsis of some kind" resulting from that investigation (J.A. 38). He also recollected hearings in 1954.[2]

The witness further testified that the information he received from the Committee files and from Committee investigators was sufficient in his mind to justify the issuance of a subpoena to the petitioner. This testimony will be considered in more detail below.

After the Government rested, an offer of proof was made by the petitioner in support of his contention that his individual interest and the public interest in protecting his rights of free speech and assembly and his right of privacy overbalanced the public interest in securing answers to the questions put to him (J.A. 94-6). The offer was rejected, and petitioner rested (J.A. 96). The offer of proof appears in the record at J.A. 97-118. The court denied a motion for direction of acquittal and found the petitioner guilty on all three counts (J.A. 96). He was sentenced to imprisonment for a term of four months and to pay a fine of $100. He was continued at large on bail of $1,000.

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[2] In fact, extensive hearings, accompanied by a "Progress Report" had been issued by the Senate Committee in 1951 and further hearings with a "Supplemental Report" had been issued in 1952 (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess., May 14-June 14, 1951 and Supplemental Hearings, 82nd Cong., 2nd Sess., January 22, 1952, both entitled "Subversive Infiltration in the Telegraph Industry"). The 1954 hearings, also conducted by Mr. Arens, are dated December, 1953 and March, 1954, 83rd Cong., 2nd Sess., and are entitled "Subversive Influence in Certain Labor Organizations".

Reasons for Granting the Writ

1. This case presents directly for decision the question which this Court declined to consider in *Barenblatt* v. *United States*, 360 U. S. 109, namely, whether a witness may be held for contempt for refusal to answer questions relating to the names of other persons who are associated with him in political activity under investigation by the Committee. Count 3 in *Barenblatt* related to the following question:

> "Now you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?"

The Court stated, at page 115:

> "As we conceive the ultimate issue in this case to be whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country, we find it unnecessary to consider the validity of his conviction under the Third and Fifth counts, the only ones involving questions which on their face do not directly relate to such participation and knowledge."

The three questions at issue here likewise do not relate to petitioner's "participation in or knowledge of alleged Communist Party activities", but rather to the identity of other persons in the Party.

It will, we believe, be admitted by the Government that the three questions involved, although not directly requiring the names of persons who were members of the Communist Party with petitioner, were preliminaries to such questions. Mr. Arens so stated in arguing the pertinency of the first question (J.A. 28). Congressman Scherer repeated this explanation of pertinency in relation to the third and fourth questions (J.A. 34), and the Court below accepted the fact that the questions were designed to get at the identity of other persons (*infra*, p. 21).

The witness was, it will be noted, quite willing to answer all questions concerning his own participation in and knowledge of the activities of the Communist Party, though the Committee showed a lack of interest in such activities and asked no questions concerning them.

In effect, therefore, the questions put to petitioner really constituted a discovery proceeding. The Committee was using him, not to get evidence concerning activities of the Communist Party but to get the names of other persons so that they in turn could be questioned.

We do not understand that the Committee has any such authority: indeed, the questions here asked were in aid of the "exposure" purposes of the Committee and not of its legislative purpose. The Committee had received scores of names from other witnesses testifying at the same hearing. (Hearings before the Committee, 85th Cong. 1st Sess., entitled "Investigation of Communist Penetration of Communications Facilities, Part I") to say nothing of the hundreds of names secured in the 1951, 1952 and 1954 hearings. Few of these persons were in fact called by the Committee; the fact that their names were made public was sufficient for Committee purposes.

This Court has recognized that in this area, in which a close balance exists between the individual and public rights involved, the issue of pertinency should be scrutinized with great care. Cf. *Watkins* v. *United States*, 354 U. S. 178; *Deutch* v. *United States*, 367 U. S. 456. The questions here under consideration cannot bear such scrutiny.

Furthermore, it must be noted that petitioner had not been a member of the Communist Party for about nine years prior to his testimony. Testimony as remote as any the petitioner was required to give likewise fails to meet the test of pertinency.

Finally, a consideration of the testimony relating to the specific counts on which petitioner was convicted would

call for a reversal. The first count involves a question which was answered sufficiently prior to the refusal to answer. It will be noted (J.A. 27, 28) that Mr. Scherer asked, "Is that person still a member of the Communist Party today * * * as a communications worker?" The petitioner answered "To the best of my knowledge he is no longer in the industry." He was then asked, "Was he a communications worker?" His refusal to answer did not deprive Congress of information; that information had been fully supplied by the previous answer.

With respect to Counts 3 and 4 it will be noted that no explanation of pertinency was made until *after* the witness had been directed to answer the questions and he had refused to do so (J.A. 34). The witness was never given an opportunity to make answer after pertinency had been pointed out to him.

2. There was no probable cause to issue a subpoena to petitioner. This Court in *Barenblatt* said, at page 134:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."

The Court, in a footnote, referred to sworn testimony given before the Committee identifying Barenblatt as a member of the Communist Party, and to "evidence" in its files to the same effect.

See also *Wilkinson* v. *United States*, 365 U. S. 399, at 412, where this Court again refers to sworn direct testimony as constituting "probable cause".

Here the only "probable cause" for belief that the petitioner had information which might be helpful to the Committee consisted of: (1) a seventeen year old newspaper report that members of an opposing political faction

had called petitioner, and ninety-eight other persons, "reds" in the course of a primary fight (J.A. 87); (2) a hearsay report that unidentified persons had said that petitioner and his son were members of the Communist Party (J.A. 89, 90), and (3) an assertion that many years ago petitioner had signed a Communist Party nominating petition (J.A. 87).

The term "probable cause" is no stranger to the law, and its meaning has often been defined. Thus the Court said in *Contee* v. *United States*, 215 F. 2d 324, 327 (C. A. D. C. 1954):

> "An uncorroborated tip of an informer, whose identity and reliability are both unknown, does not constitute probable cause to make an arrest."

In *Cervantes* v. *United States*, 263 F. 2d 800, at 803 (C. A. 9, 1959), the Court noted:

> "* * * probable cause means more than a large suspicion."

And in *United States* v. *Castle*, 138 F. Supp. 436 (D. C. D. C. 1955), Judge Youngdahl, in ruling evidence inadmissible, said:

> "An arrest or warrant for an arrest may not be based upon the suspicion or opinion of some person, unsupported by personal knowledge of the facts, and a warrant to search a private home may not rest upon a mere statement of suspicion without the disclosure of supporting facts and circumstances to justify the suspicion."

It is also clear that the burden of establishing probable cause is on the Government. *Wrightson* v. *United States*, 222 F. 2d 556 (1955); *Cervantes* v. *United States*, *supra*.

If, as this Court has held, probable cause is necessary for the issuance of a subpoena, it is clear that no probable

cause existed here. Unlike the other cases which have come before this Court we have here no sworn testimony but only rumors and gossip, originating with persons who, so far as we know, were not even known to the Committee. Added to this is the fact that petitioner, along with thousands of others, is alleged to have once signed a Communist Party nominating petition.[3]

3. In the *Barenblatt* case this Court assumed the difficult burden of balancing "the competing private and public interests at stake in the particular circumstances shown." 360 U. S. at 126.

So long as the *Barenblatt* rule remains in effect, a court trying a case affecting First Amendment rights must likewise balance the competing private and public interests at stake in the "particular circumstances" of each case. Every defendant in a criminal case is entitled to a trial on the record in his own case and not on the basis of findings made in some other case.

We do not understand the holding of the Court of Appeals (*infra*, p. 21) that the "balancing" is a "a matter of law for decision by the Court." Certainly it is facts which must be balanced; otherwise the balancing doctrine enunciated by the Court is merely a way of denying constitutional rights whenever Congress feels that national security is at stake. Some clarification by this Court is necessary if the lower courts, and counsel trying these cases, are to apply the balancing doctrine in this and other cases involving the First Amendment.

It is clear, of course, that this Court does in fact balance interests separately in each case and that such balance is

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[3] There is no evidence in the record as to when such petition was signed. The most recent date on which appellant could have signed a nominating petition for Davis was 1946, when Davis ran for Attorney General of New York State on the Communist Party ticket. A nominating petition for that office would require 12,000 signatures. Amter had run for governor in 1942 and for member of the City Council in 1937 and 1939.

based on a factual analysis. In *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479 and *Louisiana* v. *NAACP*, 366 U. S. 293, this Court considered the facts in each case and after balancing them came to the conclusion that the rights of the individuals involved outweighed the rights of the states in enforcing legislation which impinged on First and Fourteenth Amendment rights. This offers no unusual or unprecedented problems; this Court has long followed a similar process in considering the constitutionality of legislation which sought to regulate commercial enterprises. *Muller* v. *Oregon*, 208 U. S. 412; *Nebbia* v. *New York*, 291 U. S. 502.

It is clear that the interest of the Committee in securing the answers to the question it put to petitioner was minuscule in the circumstances presented in this case and can hardly be said to outweigh the substantial rights of petitioner which were being infringed, to say nothing of the rights of the public in the free exercise of political freedoms. As is noted above, this is not the first time there has been a congressional investigation of the communications industry. In the 1951, 1952 and 1954 hearings about a hundred alleged Communists had been named. (See Hearings cited *supra*, at p. 6.) Is petitioner to lose his basic rights because he refused to name two or three more?

Petitioner's membership in the Party had been remote in time and casual in substance. There is nothing to suggest that he could have named anyone whose name had not been submitted to the Committee, or who would come forward to add anything substantial to the material already submitted to the Congress on this and other occasions.

Against this we must set the constitutional rights of petitioner—constitutional rights which the Courts generally agree are of the utmost importance. See *Barenblatt* at page 112 and *Watkins* at page 197. The issue between the majority and minority members of the Court in *Barenblatt*

was the circumstances under which those First Amendment rights could be invaded. We submit that under the circumstances shown here the invasion is not justified by any overwhelming or even important public interest which required the petitioner to surrender those rights in order to add a couple of names of alleged Communists to the many names already in the possession of the Committee.

4. The trial court erred in excluding the proffered testimony of Professor Thomas I. Emerson on the issue of the competing public and private interests at stake.

In *Barenblatt*, the Court (at p. 128, *et seq.*) made certain "findings" with respect to the alleged threat of Communism to the United States. We assume that those findings were made on the basis of the record in that case, together with additional facts of which the Court took judicial notice. In the instant case, there are no facts in the record on the basis of which any finding could be made that Communism constitutes a sufficient threat to the United States to justify the interference with First Amendment rights which, it must be generally conceded, existed here. So we must assume that the District Court took judicial notice of the facts it was required to find under the *Barenblatt* decision, namely, that in balancing the competing private and public interests at take in these circumstances, the public interests outweighed the private.

The doctrine of judicial notice can never constitutionally be utilized to bar evidence seeking to contradict "common knowledge." Testimony is always admissible on any factual issue before the Court. As the Supreme Court said in *Ohio Bell Telephone Co.* v. *The Public Utilities Commission of Ohio*, 301 U. S. 292, 301:

> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence, Wigmore, Evidence § 2567; 1 Greenleaf,

> Evidence, 16 Ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*"

To the same effect, see *Grand Opera Co.* v. *Twentieth Century Fox Film Corp.*, 235 F. 2d 303, 307 (C. A. 7, 1956); *In Re Bowling Green Milling Co.*, 132 F. 2d 279 (C. C. A. 6, 1942); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2, 1945).

Petitioner contends that if "competing private and public interests at stake" in the circumstances here are balanced, the private interests far outweigh the public. To establish his contention on that point, Professor Thomas I. Emerson, Professor Law at Yale University, was offered as a witness. His testimony was reduced to writing and was submitted to the Court at the trial for a ruling as to admissibility. The Court refused to accept the testimony, but the offer of proof is a part of the record and appears at J.A. 97-118.

We shall not summarize that testimony here except to say that after qualifying himself as an expert who has made an extensive study of the subject (J.A. 100-102), Professor Emerson came to the conclusion, on the basis of facts set forth in the record "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society" (J.A. 117-118).

We shall not here consider the merits of Professor Emerson's testimony or its weight but only its admissibility. It seems clear that if the balancing concept established by the Court in the *Barenblatt*, *NAACP*, *Bates* and *Shelton*

cases, *supra*, is to be applied in a way that will protect the constitutional liberties of petitioner and others similarly situated, testimony on the subject must be admissible.

5. Prior to trial, petitioner moved for an opportunity for a hearing on the qualification of the Grand Jurors, pointing out that fifteen members of the Jury that indicted petitioner were government employees (J.A. 5). The motion was denied.

In *Frazier* v. *United States*, 335 U. S. 497, this Court, in a five to four decision, held that the mere fact that members of a Jury were government employees would not disqualify them, but that they could be challenged for actual bias. In *Dennis* v. *United States*, 339 U. S. 162, this Court rejected the argument that the loyalty procedures of the Government in that past few years *ipso facto* created bias and fear in the minds of any government employees acting as a juryman in a case involving a Communist. The Court held that actual bias had to be shown and said "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." (339 U. S. at 168.) In *Cammer* v. *United States*, 350 U. S. 399, when an attorney sought to investigate actual bias, he was convicted of contempt and while the conviction was reversed in this Court, his experiences hardly offer encouragement to counsel who would make a direct and private investigation of factual bias.

The only way which seems to remain to "raise a contention of bias from the realm of speculation to the realm of fact" would seem to be the procedure sought to be followed in this case. If the District Court was right in denying petitioner's motion, the promise of this Court in *Dennis* is an empty one and the fears expressed by the minority of the Court in the *Frazier* case will be well justified.

This issue has been implicit in a number of similar cases heretofore before this Court, but they have not been reached. *Quinn* v. *United States*, 349 U. S. 155; *Watkins*

v. *United States*, 354 U. S. 178; cf. *Gold* v. *United States*, 352 U. S. 985. It is, we believe, raised by the petitioners in *Shelton*, *Liveright*, *Price and Gojack*, now awaiting argument in this Court.

6. In the court below petitioner urged that the activities of the Committee violated his First Amendment rights, that the resolution creating the Committee was unconstitutionally vague and that the Committee was not engaged in a *bona fide* legislative purpose. This Court rejected those arguments in the *Barenblatt*, *Wilkinson* and *Braden* cases and they will not be repeated here, since there is little that we could add to the petitioners' briefs and the eloquent dissenting opinions in those cases. Those contentions, however, are not abandoned and petitioner hopes that this Court will once again review those issues and correct what we conceive to be a serious impairment of the constitutional rights of petitioner and all others in similar positions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
Attorneys for Petitioner,
25 Broad Street,
New York, N. Y.

September 25, 1961.

Appendix A

(Opinion of United States Court of Appeals, for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,779

BERNARD SILBER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 30, 1961

MR. VICTOR RABINOWITZ, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom MR. DAVID REIN was on the brief, for appellant.

MR. WILLIAM HITZ, Assistant United States Attorney, with whom MESSRS. OLIVER GASCH, United States Attorney at the time of argument, CARL W. BELCHER, Assistant United States Attorney at the time of argument, and MISS DORIS SPANGENBURG, Assistant United States Attorney, were on the brief, for appellee.

Before MR. JUSTICE REED, retired,* BAZELON and BASTIAN, Circuit Judges.

* Sitting by designation pursuant to Sec. 294 (a), Title 28, U. S. Code.

BASTIAN, *Circuit Judge*: This case is a companion to *Grumman* v. *United States*, No. 15,747, decided today. Appellant, like Grumman, was called to testify before a subcommittee of the House Committee on Un-American Activities during a series of hearings on communist infiltration into the communications industry.

Appellant was called on August 2, 1957. At the commencement of proceedings on that day, and in the presence of appellant, the subcommittee chairman, Mr. Clyde Doyle, made the following statement:

> "This morning's hearings are a continuation of previous hearings started on July 17, 1957, this being a continuation of a series of hearings in the communications industry in the United States, namely, the position and influence held by members of the Communist Party and organization dedicated to the Communist objectives in that field of communications industry, principally.
>
> • • •
>
> [Mr. Doyle then read into the record the resolution of the full committee authorizing the hearings currently in progress. The language of that resolution is quoted in Grumman.]
>
> • • •
>
> "[In] these hearings, the second of a series on this general subject, the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications.
>
> "In the event that testimony given during these hearings reflects a situation correctable by legislation or which may be remedied by legislation, the committee will recommend the appropriate measures at the proper time."

In response to questioning by a staff member of the committee, appellant testified that he had been a member of the Communist Party some years previously, and that

in his work for Western Union Telegraph he handled Government coded messages. He refused to name the person who had recruited him into the Party and refused to state whether he knew any communists presently in the industry. The exact questions forming the basis of the indictment are as follows:

Count One: "Was he [the person who recruited defendant in the Communist Party] a communications worker?"

Count Two: "We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists."

Count Three: "Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?"

Count Four: "Were any of the present officers of your union members of the Communist Party at the time you were in the Party?"

When appellant declined to answer these questions,[1] referring to the statement of objections filed by Grumman, the pertinency of the questions was explained to him as follows:

> "Mr. Arens [Counsel for Committee]: Mr. Chairman, I respectfully suggest that I be permitted to explain to the witness why it is pertinent to this inquiry for us to insist that this witness tell us whether or not the person who recruited him into the Communist Party was at that time in the communications field as a communications worker.
>
> "Now, Mr. Witness, this committee is considering legislation to safeguard this Nation from possible espionage or sabotage facilities by Communists.
>
> "If the person who enlisted you into the Communist party was engaged in the communications field, that person undoubtedly would have some informa-

[1]Appellant, like Grumman, did not urge the Fifth Amendment.

> tion which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country.
>
> • • •
>
> "If you do have such information and if we can get the names of those people and if we can get them to testify, we will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation."

The pertinency of the specific questions forming Counts Three and Four of the indictment was explained to appellant by Mr. Gordon H. Scherer, a committee member, as follows:

> "[T]hose questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced."

At the trial in the District Court, Count Two of the indictment was dismissed on motion of appellant. He was convicted on the remaining three counts and was duly sentenced. This appeal followed.

Richard Arens, the committee counsel, testified at the trial that appellant was called to testify before the committee on the following basis: (1) his name appeared on a list given the committee by Western Union Telegraph of its employees who, in their work, had access to Government coded messages; (2) the committee files listed appellant as a member of the American Communications Association [as stated in Grumman, testimony before the committee had identified certain officers of that Association as communists]; and (3) a New York Times article published in 1940 contained an account of union litigation in which it was alleged that appellant was a "Red."

We have already decided, in *Grumman*, that the subcommittee's investigation of the subject was authorized by Congress; that the subcommittee was pursuing a valid

legislative purpose in conducting this investigation; and that the subcommittee's interrogation in the course of its investigation in the communications field did not violate First Amendment rights of free association and free speech.

We think the questions asked appellant were clearly pertinent to the subject matter under investigation. It is difficult to imagine questions more pertinent to an effort to discover the identity of persons possessing the very information the committee sought. We think, too, that the explanation of pertinency given appellant made that pertinency clear beyond any doubt. In such circumstances, appellant's refusal to answer amounted to a refusal to identify to the committee persons who might possess up-to-date knowledge of the details and extent of communist conspiracy in the industry under investigation, and a refusal, in effect, to state even whether or not such a conspiracy existed.

Appellant further complains of the exclusion by the trial court of his proffered expert testimony on the question of "balancing" the interest of the Government in eliciting the testimony sought against the First Amendment rights asserted by the witness. This "balancing" is strictly a matter of law for decision by the court and, therefore, "expert" testimony is irrelevant.

Appellant seeks to distinguish this case from *Wilkinson* v. *United States*, 365 U. S. 399 (1961), and *Braden* v. *United States*, 365 U. S. 431 (1961), on the ground that the committee lacked probable cause for calling him inasmuch as he was not identified by prior witnesses as a communist. Calling him in such circumstances, he contends, amounts to an "indiscriminate dragnet procedure." See *Barenblatt* v. *United States*, 360 U. S. 109, 134 (1960).

We know of no requirement that a prospective witness actually be named as a communist by a prior witness before he may legally be called by a congressional investigating committee. Certainly the committee had probable cause to inquire whether appellant was a communist. His affirmative answer to the questioning as to party membership

in and of itself was sufficient to induce the committee to seek from him the information it wanted. This, we think, is what the Supreme Court meant, in *Wilkinson*, when it said: "Indeed, it is difficult to imagine a preliminary question more pertinent to the topics under investigation than whether petitioner was in fact a member of the Communist Party."

In accordance with our action in delaying decision in *Grumman*, we delayed decision in this case, which, like *Grumman*, is readily distinguishable from *Deutch* v. *United States*, decided June 12, 1961. As in *Grumman*, the questions asked of appellant here were clearly pertinent to the subject under inquiry and in no way represented an excursion beyond the announced purpose and scope of the committee's inquiry.

We have examined the other contentions of appellant and find no error.

Affirmed

BAZELON, *Circuit Judge*, concurring in the result: Two principal grounds of error are raised on this appeal: (1) that the questions which appellant refused to answer, relating to the names of other persons associated with him in political activity, were not pertinent to the congressional inquiry; and (2) that there was no showing of probable cause sufficient to justify the issuance of a subpoena to appellant. I agree that the first contention must be rejected if we are to consider the question of pertinency to be resolved without reference to First Amendment rights. I also agree that the second contention must fail since we are bound by this court's decision in *Shelton* v. *United States*, 108 U. S. App. D. C. 153, 280 F. 2d 701 (1960), *cert. granted*, 365 U. S. 857 (1961).

Appendix B

(Judgment)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960.
Criminal 753-58

No. 15-779
BERNARD SILBER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

MR. JUSTICE REED, retired, and BAZELON and BASTIAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per CIRCUIT JUDGE BASTIAN.

Dated: Jun. 30, 1961.

Separate opinion by CIRCUIT JUDGE BAZELON concurring in the result.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–22) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1961. A petition for rehearing was denied on August 1, 1961. On August 16, 1961, Mr. Justice Black granted an extension of time for the filing of a petition for certiorari to and including September 30, 1961, and the petition was filed on September 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the resolution of Congress authorizing the House Committee on Un-American Activities is unconstitutionally vague and whether the investigation was carried on by the Committee for a valid legislative purpose.

2. Whether the investigation violated petitioner's rights under the First Amendment.

3. Whether the trial court erred in excluding expert testimony on the factors which should be considered by the court in balancing the public and private interests involved in order to determine petitioner's rights under the First Amendment.

4. Whether a Congressional committee may subpoena a person to testify if it has reasonable basis for believing that he possesses information of value to it and, if so, whether the Committee had such information as to petitioner.

5. Whether the questions which petitioner was convicted for refusing to answer were pertinent to the subject under inquiry and whether petitioner was properly apprised of such pertinency.

6. Whether a defendant, who is indicted by a grand jury composed, in part, of federal government employees, is entitled to a hearing on the basis of general allegations that such jurors are biased and intimidated as a result of the government security program.

STATUTE INVOLVED

Section 192 of chapter 2 of the United States Code (R.S. 102, as amended) is set forth in the petition at page 3.

STATEMENT

Petitioner was charged in a four-count indictment (J.A. 2–3)[1] in the District Court for the District of Columbia with having unlawfully refused, in violation of 2 U.S.C. 192, to answer four questions pertinent to the matter under inquiry, asked him by a subcommittee of the House Committee on Un-American Activities. Count 2 was dismissed on motion of petitioner (J.A. 10). Having waived trial by jury, petitioner was found guilty on Counts one, three, and four, and was sentenced to four months' imprisonment and to pay a fine of $100 (J.A. 10–11).

The pertinent facts may be summarized as follows:

In the summer of 1956, the Committee began an investigation of Communist penetration of communications facilities (J.A. 12–13). During its investigation the Committee received information that petitioner was employed in the communications industry as an employee of Western Union Telegraph Company, that he handled government coded messages, that he was a member of the American Communications Association, a Communist controlled union, and that he was a member of the Communist party (J.A. 81–82, 87, 89–90). On the basis of that information, the Committee believed that petitioner had information which would be useful to it in its investigation (J.A. 14–15; Gov. Ex. 4, pp. 1–2).

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[1] "J.A." refers to the Joint Appendix in the court of appeals.

On July 10, 1957, the Committee adopted a resolution authorizing (J.A. 20–21):

> the holding of hearings in Washington, beginning July 17, 1957, * * * for the purpose of considering whether or not members of the Communist Party, or persons subject to its discipline are employed in various media of communications used in the transmission of vital communications, and the advisability, in the national defense and for internal security, of the adoption of remedial legislation authorizing the Defense Department and other Government agencies to adopt and enforce appropriate regulations designed to protect and preserve inviolate secret and classified Government information and investing in appropriate Government agencies, power to preclude access to vital communication facilities in time of war or other national emergency, persons who probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage.

On July 12, 1957, the Chairman of the Committee appointed a subcommittee of three to conduct the hearings (J.A. 21).

The subcommittee met on July 17, 1957. In his opening statement the chairman of the subcommittee read the Committee's resolution of July 10, 1957, and went on to say (Gov. Ex. 8,[2] p. 1378):

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[2] Government Exhibit 8 is Part I of the Hearings before the Committee on Un-American Activities of the House of Representatives, 85th Cong., 1st Sess., July 17, 18, 19, August 2, 9, 1957, entitled *Investigation of Communist Penetration of Communications Facilities.*

> In these hearings beginning now, the first of a series of this general subject, the committee hopes to ascertain the extent of the penetration and control exercised by members of the Communist Party over an industry which is vital to our defense; namely, communications. In the event that testimony given during these hearings reflects a situation correctable by legislation, the committee will recommend the appropriate measures at the proper time. It is the purpose of the subcommittee in the conduct of these hearings, to discharge the duties placed upon us by the Congress by calling witnesses who, we have reason to believe, possess information which will be of value to us and to the Congress in the consideration of such legislation.

Witnesses heard on July 17 testified to the vulnerability of the communications system to sabotage and of the efforts of the Communist Party to infiltrate that industry. The first witness was the president of American Cable and Radio Corporation, Admiral Ellery W. Stone. Admiral Stone testified that that corporation was engaged in international communications by wire and radio, that it also operated a shore-to-ship system, and that its services were used by private companies engaged in defense work and by agencies of the United States Government including the State Department and the Armed Forces (Gov. Ex. 8, pp. 1379–1380). He also testified that employees have access to confidential and coded messages, disclosure of which would be dangerous to national security, that a subversively inclined employee could deliver copies of such messages to outsiders and commit acts of sabotage to delicate and complex equip-

ment, and that employment on international communications facilities would give employees the means of sending information to the enemy (*id.* at p. 1381).

Admiral Stone testified that one of the three principal labor organizations in the communications industry was the American Communications Association, and that that union had been expelled from the C.I.O. in 1950 because it was dominated by the Communist Party and because the union's policies and activities from 1939 "resulted in subservience to the interests of the Communist Party, and through that party to the Soviet Union" (Gov. Ex. 8, pp. 1381–1383). He testified that, in 1951 and 1952, witnesses before a Senate subcommittee had identified some of the principal officers of the union as Communists and that those persons were still (in 1957) officers of the union (*id.* at pp. 1386–1387). Nevertheless, he said, the union was still certified by the National Labor Relations Board as a bargaining agency for communications workers, and he submitted recommendations for amendments to Section 9(h) of the Taft-Hartley Act to prevent Communist-dominated unions from being certified (*id.* at pp. 1392–1396).

J. L. Wilcox and Clarence Willis of the Western Union Telegraph Company also testified that the American Communications Association was operating in the field of international communications, that certain officers of the Association had been identified as members or one-time members of the Communist Party, and that there was a substantial possibility of sabotage by employees who had an inclination to commit such acts (Gov. Ex. 8, pp. 1400–1410).

Another witness before the subcommittee on July 17 was Michael Mignon, a union representative for the Communications Workers of America, A.F.L.–C.I.O. (Gov. Ex. 8, p. 1410). He had been a vice president of the Association in 1938 (*ibid.*). Mignon testified that he had been a member of the Communist Party from 1936 to probably late 1940, at the same time that he was active in union affairs in the Association, and that he participated in closed Communist cell meetings in which union policy was secretly determined and adopted without the knowledge of the membership in general (*id.* at pp. 1411–1412). He stated that "the importance of obtaining control of the communications industry in times of stress or in revolutionary times was a primary factor, and therefore the efforts of the Communist Party in subsidizing the union and offering whatever assistance they could in building the union in the communications industry was primarily the main objective" (*id.* at p. 1411). He said that, even if the Party was unable to gain control of the union, it would still be in a position to sabotage (*id.* at p. 1420).

After hearing testimony on July 18 and 19, the subcommittee continued the hearings over to August 2, 1957.[3] In an opening statement on that day, which was heard by petitioner (J.A. 29), the chairman announced (J.A. 20):

> This morning's hearings are a continuation of previous hearings started on July 17, 1957, this

[3] One of the witnesses who appeared on July 18 was Frank Grumman, who, like petitioner, refused to answer numerous questions and was convicted of contempt. See *Grumman* v. *United States*, pending on petition for a writ of certiorari, No. 436, this Term.

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> being a continuation of a series of hearings in the communications industry in the United States, namely, the position and influence held by members of the Communist Party and organizations dedicated to the Communist objective in that field of communications industry, principally.

The chairman then set forth the Congressional resolution authorizing the Committee and the Committee's own resolution of July 10, 1957 (see *supra*, p. 4), authorizing the hearings (J.A. 20–22). He continued (J.A. 22–23):

> In these hearings * * * the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications.
>
> In the event the testimony given during these hearings reflects a situation correctable by legislation or which may be remedied by legislation, the committee will recommend the appropriate measures at the proper time.
>
> It is the purpose of the subcommittee in the conduct of these hearings to discharge the duties placed upon us by the Congress by calling witnesses who, we have reason to believe, possess information which will be of value to us and to the Congress in the consideration of such legislation.

Petitioner, who was the third witness on that day, testified that he had been a service writer for Western Union Telegraph for forty-one years and that he had access to government coded messages (J.A. 24–25).

He testified that he was not at that time (1957) a member of the Communist Party, but that he had been a member of the Party in 1948 (J.A. 26). When he was asked who enlisted him into the Party, petitioner refused to answer "on the grounds set forth in the decision of the Supreme Court in the *Watkins* and *Sweezy* cases, and the statement filed with the committee by Mr. Grumman on July 18, including (1) the lack of jurisdiction of the committee; (2) my rights under the first amendment; (3) the vagueness of the resolution setting up this committee; and (4) the lack of pertinency of this committee" (J.A. 26).[4]

Petitioner was then asked the question which formed the basis of Count one of the indictment, *i.e.*, whether the person who recruited him into the Party was a communications worker (J.A. 27-28). Upon his refusal to answer for the reasons previously given, the staff director of the Committee said (J.A. 28):

> Mr. Chairman, I respectfully suggest that I be permitted to explain to the witness why it is pertinent to this inquiry for us to insist that this witness tell us whether or not the person who recruited him into the Communist Party was at that time in the communications field as a communications worker.

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[4] The petition states that no question was asked by Mr. Arens as to who enlisted petitioner into the Communist Party (Pet. 4, note 1). That is an error, apparently resulting from the fact that in the Joint Appendix, p. 26, two lines of the interrogation were inadvertently omitted. The two lines read:

"It had no real name, no designation for it of any kind [in answer to the question what cell or group of the Party he belonged to].

"Mr. ARENS. Who enlisted you in the Communist Party?"

Petitioner's statement of objections followed (J.A. 26; Gov. Ex. 8, pp. 1497-1498).

> Now, Mr. Witness, this committee is considering legislation to safeguard this Nation from possible espionage or sabotage facilities by Communists.
>
> If the person who enlisted you into the Communist Party was engaged in the communications field, that person undoubtedly would have some information which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country.
>
> Therefore, I respectfully suggest now, Mr. Chairman, that this witness be ordered and directed to tell the committee whether or not the person who recruited him into the Communist Party was, to his knowledge, engaged in the communications industry.

When directed by the chairman to answer, petitioner persisted in his refusal to answer "on the reasons stated previously * * * [i]ncluding the matter of personal conscience which prevents me from doing things that I am not sure of, and also on the grounds that I don't see what this question has to do with the question propaganda which this committee is concerned with" (J.A. 30).

The staff director then stated to petitioner (J.A. 30–31):

> On the basis of extensive staff investigation it is the judgment of the staff that there is now in the establishment in which you are engaged at least one cell of the Communist Party operating.
>
> We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists.

After petitioner declined to answer "on the grounds stated," the staff director further advised him (J.A. 31):

> I say to you that the pertinency of that question is this: If you do have such information and if we can get the names of those people and if we can get them to testify, we will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation.

The chairman directed petitioner to answer the question, stating that "[c]ounsel now for the second time has explained the pertinency of the other question, and that the same explanation plus this explanation as to pertinency applies" (J.A. 31). Petitioner still refused to answer, and his refusal constituted the basis for Count two of the indictment.

Petitioner denied that he was relying on the self-incrimination clause of the Fifth Amendment (J.A. 33). After answering questions about his withdrawal from the Party, he was asked to what union he belonged (J.A. 33–34). He replied, "the American Communications Association" (J.A. 34). He was then asked and refused to answer the questions on which Counts three and four were based—namely, "were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party," and "were any of the present officers of your union members of the Communist Party at the time you were in the party" (J.A. 34). Petitioner was advised that "the questions were asked you for the same reasons that Mr. Arens, our counsel,

gave you for asking the other questions" and that the questions "are pertinent for the same reasons that he [Mr. Arens] advanced" (J.A. 34).

The subcommittee reported the fact of petitioner's contumacy to the full Committee which in turn made its report to the House of Representatives (Gov. Ex. 4; H. Rep. 1241, 85th Cong., 1st Sess., p. 16). The House directed that the report be certified by the Speaker to the United States Attorney for prosecution (Gov. Ex. 5; H. Res. 409, 85th Cong., 1st Sess.), and the certification was made as directed (Gov. Ex. 6).

ARGUMENT

Petitioner was convicted for refusing to answer three questions asked him by a Congressional committee concerning the Communist Party—whether the person who recruited him into the Party was a communications worker (Count one), whether any of the officers of his union were members of the Communist Party at the time he was a member of the Communist Party (Count three), and whether any present officers of the American Communications Association were Party members when he was in the Party (Count four). While all three related to the activities of other persons, none asked for the disclosure of the names of Party members. Admittedly, if petitioner had answered these questions, the subcommittee would have likely asked further questions concerning the names. Nevertheless, it is clear that answers to each of these questions, and particularly the question involved in Count four, would in themselves probably provide information of considerable value to the Committee. And

we emphasize that since petitioner was given a general sentence and fine on all three counts which was less than the maximum authorized by 2 U.S.C. 192 under any one count, the judgment below must be affirmed if any one of the counts is upheld. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115.

1. Petitioner claims (Pet. 16) that the hearing at which he appeared had no valid legislative purpose and that the resolution creating the Committee was unconstitutionally vague. But as petitioner himself admits, these issues are controlled by the decisions of the Court in *Barenblatt, Wilkinson* v. *United States,* 365 U.S. 399, and *Braden* v. *United States,* 365 U.S. 431.

2. Petitioner's basic contentions concerning the First Amendment, as he himself seems to admit (Pet. 16), have been answered by the *Barenblatt, Wilkinson,* and *Braden* cases, which establish that the First Amendment does not prohibit Congress from investigating Communist activities. There are, however, three First Amendment issues which might be said to be based on the particular circumstances of this case.

a. Petitioner argues (Pet. 11–13) that *Barenblatt* v. *United States, supra,* 360 U.S. at 126, requires that "[w]hen First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown" and that here the balance must be struck in favor of the individual interests. We submit, on the contrary, that the public interest in this case outweighs the individual in-

terests involved even more clearly than in the *Barenblatt, Wilkinson,* and *Braden* cases.

In those cases the House Committee on Un-American Activities was investigating the Party's organization and Communist activity in education, in propaganda, and in the South. Important as such investigations were, we submit that the investigation in this case was of considerably greater importance to the national security. For, as the hearings before the Committee showed (see *supra,* pp. 5–7), the Committee had considerable information that the Communist Party has had great success in infiltrating the communications industry, to the extent that it even controlled an important union in that industry. Moreover, the Committee heard testimony that Communists were in a position to intercept secret government messages and to engage in sabotage.

The Court in *Barenblatt* mentioned three particular considerations in weighing the private and public interests (360 U.S. at 134). First, the Court found that "[t]here is no indication in this record that the Subcommittee was attempting to pillory witnesses" (*ibid.*). Similarly, there is no such indication in this record. The subcommittee allowed the petitioner to state his objections fully, and then made a considerable effort to persuade petitioner to testify (see *supra,* pp. 9–11).

Second, the Court found in *Barenblatt* that the witness did not appear as a result of "indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee" (360 U.S. at 134).

Here, the Committee had information, and subsequently petitioner admitted, that he had been a Party member, that he was a member of the American Communications Association (which, according to considerable information possessed by the Committee, was controlled by Communists), that he worked in the communications industry for forty-one years, and that he had access to government coded messages. Clearly, it was reasonable for the Committee to question petitioner as part of the investigation of Communist activities in the communications industry.

And, third, the Court in *Barenblatt* said that "the relevancy of the questions * * * is not open to doubt" (360 U.S. at 134). As we will show (pp. 21–23), the same is equally true in this case; the pertinency of the questions to the subject under inquiry was clear and was explained to petitioner at the hearing.

Petitioner claims (Pet. 12), however, that the Congress (through the Senate Internal Security Subcommittee) had previously conducted investigations of Communist activity in the communications industry in 1951, 1952, and 1954, and that there was nothing to suggest that petitioner had any information of use to the House Committee. Since the Senate Committee had found considerable Communist activity in the communications industry endangering national security,[5] the House Committee clearly had a great interest in bringing this information up to date in 1957. More-

[5] See e.g., Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 82d Cong., 1st Sess., on Subversive Infiltration in the Telegraph Industry, May 14, 15, 16, June 5, 6, 12, and 14, 1951.

over, while petitioner testified that he had joined the Party in 1948 and remained a member only in a casual way for "a few years" after 1948 (J.A. 26), the Committee could reasonably believe that he had information of value to its investigation. If petitioner had answered the questions involved in this proceeding, the Committee would have probably learned of other Party members in the communications industry. If these people were still Party members, this would further add to the Committee's knowledge of present Party infiltration of the communications industry. Even if they were no longer members, they could be asked to testify concerning Party methods and operations, as well as about other persons in the communications industry whom they knew to be Party members.

b. It makes no difference that the questions as to which petitioner was convicted relate to other persons. First, the questions petitioner refused to answer did not interfere with his own First Amendment rights of speech and association since any interference with those rights had already occurred when he admitted his own Communist Party membership. Moreover, petitioner claimed only his own First Amendment rights before the subcommittee and not those of other persons (J.A. 26). And it is well established by decisions of this Court that a witness before a Congressional committee can raise at his trial for contempt only those objections he stated to the committee at the time he refused to answer its questions. *E.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 439, note 15 (a claim under the First Amendment); *Barenblatt* v.

United States, supra, 360 U.S. at 123–124 (a claim that a committee failed to apprise the witness of the pertinency of the questions).

Second, it is also well established that a person cannot claim the constitutional rights of other persons. *E.g., Tileston* v. *Ullman,* 318 U.S. 44, 46; *Jones* v. *United States,* 362 U.S. 257, 260–267. The only exception is when a litigant can properly be said to represent the persons whose constitutional rights were allegedly violated, and, in addition, the litigant himself was seriously injured. We submit that the questions as to other persons did not seriously injure petitioner. Moreover, petitioner did not have the close relationship necessary to claim that he represented other present or past members of the Communist Party. He of course was not an organization to which the third persons belonged (cf. *Pierce* v. *Society of Sisters,* 268 U.S. 510; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123); nor was he apparently an officer—or at the present time even a member—of the Party.[6] Petitioner's only connection with the unnamed third persons is at most one of friendship and association in the recent past. See the government's brief in *Deutch* v. *United States,* No. 233, Oct. Term 1960, pp. 29–35.

Third, on the merits, a Congressional committee has at least as much reason to question a witness concerning other persons as about himself. As we have indicated above (p. 16), information about other per-

[6] Cf. *Uphaus* v. *Wyman,* 360 U.S. 72, 77–78, where the Court refused to decide whether the director of a summer camp could assert the constitutional rights of his guests.

sons has at least two purposes: (1) to show the number and position of Party members in order to ascertain the extent of and danger from Party activity; and (2) to discover other witnesses who can provide information concerning Party activities. And the interference with freedom of speech and association is, at most, the same as the interference resulting from questions as to the witness' own Communist activities. Thus, just as in *Barenblatt, supra,* 360 U.S. at 134, "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended."

c. Petitioner claims (Pet. 13–15) that the trial court erred in refusing to consider the proffered testimony of Professor Emerson (J.A. 97–118) in weighing the private and public interests involved in order to determine petitioner's First Amendment rights. The proffer of evidence was identical to that in *Yellin* v. *United States,* No. 477, this Term, certiorari granted, October 9, 1961 (J.A. 95). Except for preliminary questions designed to show his qualifications as an expert, the sole questions asked Professor Emerson, a Professor of Law at Yale, were: "Have you an opinion as to the various factual considerations which have to be taken into account in balancing the competing public and private interests at stake in the circumstances here presented?" and "Professor Emerson, in your opinion, in view of the facts that you have stated, in whose favor should the balance be struck between the various interests here at stake?" (J.A. 102, 117). These questions clearly sought con-

clusions concerning a question of law. Professor Emerson's answers were concerned in large part with what legal factors the courts should consider, and what weight should be given to each of these factors, not with evidence relating to factors which the court might consider.

Professor Emerson's statements, coming at the close of petitioner's case, read like the closing argument of able counsel summarizing his client's legal position under the First Amendment. While such a statement could be properly presented by the petitioner's counsel as legal argument, either orally or in a brief, the trial court correctly held that it was not evidence.

3. Petitioner, relying heavily on cases involving arrests under the Fourth Amendment, contends (Pet. 9–11) that the Committee did not have probable cause to subpoena him. We submit that this claim is without merit.

a. As we will show in our brief in *Shelton* v. *United States*, No. 9, this Term, the issue whether a Congressional committee has probable cause to subpoena a witness must be raised when the witness appears before the committee. Here, petitioner read a statement which was prepared with the aid of counsel (J.A. 26–27) giving four grounds for his refusal but which clearly did not even suggest that he was relying on the Fourth Amendment or, even more generally, on any lack of probable cause. Thus, petitioner cannot raise his contention as to probable cause, at least insofar as it rests on the Fourth Amendment.

b. In any event, as we will show in our brief in *Shelton* v. *United States, supra,* the Fourth Amendment does not apply to subpoenas to testify as contrasted to subpoenas *duces tecum.* We further show that, even if it does apply, this Court has held in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, that its restrictions on administrative subpoenas (with regard to subpoenas *duces tecum*) are not nearly so strict as with regard to arrests and searches and seizures. The only requirements are that "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" (*id.* at 209). If the Fourth Amendment applies at all, we submit that this standard is applicable to subpoenas to testify as well as subpoenas *duces tecum,* and to Congressional committees as well as executive agencies.

Even if the Fourth Amendment does not apply to subpoenas to testify, this Court has indicated in *Barenblatt* v. *United States,* 360 U.S. 109, 134, *Braden* v. *United States,* 365 U.S. 431, 433–435, and *Wilkinson* v. *United States,* 365 U.S. 399, 412–413, that a Congressional committee investigating Communist activities cannot, consistent with the First Amendment, subpoena a witness "as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the subcommittee" (365 U.S. at 412). As we will contend in our brief in *Shelton,* the *Barenblatt, Braden,* and *Wilkinson* cases clearly do not apply the same standard of probable cause as for arrests or searches and seizures. Rather, they

apply essentially the same standard as was laid down for subpoenas *duces tecum* in the *Oklahoma Press* case.

c. Applying that standard to the facts here, the Committee clearly had reasonable ground to believe that petitioner "possessed information which might be helpful to the committee" and that was "relevant to the inquiry." The Committee heard considerable testimony that Communists held positions in the communications industry by which they could seriously endanger national security through espionage and sabotage (see *supra*, pp. 5–7). The record shows that the Committee had information that there was a Communist cell in the establishment where petitioner worked and that the American Communications Association was Communist controlled (see *supra*, pp. 3, 10). Petitioner admitted that he had been a member of the Communist Party, that he worked in the communications industry, that he was a member of the American Communications Association, and that he had access to government coded messages (see *supra*, pp. 8–9, 11). Thus, the Committee had reasonable grounds to question petitioner concerning the Committee's investigation of Communist Party activities in the communications industry.

4. Petitioner argues (Pet. 8–9) that the pertinency of the questions which resulted in his conviction to the subject under inquiry was not made sufficiently clear to him at the hearings and that the government failed to prove pertinency at his trial.

a. As to whether petitioner was sufficiently apprised of the pertinency of the questions, he admitted at the

trial that he heard the opening statement of the chairman of the subcommittee on the day he testified. The chairman stated that the hearings were a continuation of the earlier hearings which investigated "the position and influence held by members of the Communist Party and organization dedicated to the Communist objectives in that field of communications industry, principally" (J.A. 20). He then read the resolution of the Committee authorizing the hearing for the purpose of investigating Communist activities in the communications industry and of adopting legislation to protect government secrets and prevent espionage or sabotage in this industry (J.A. 20–21). Finally, the chairman said that "[i]n these hearings * * * the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications" (J.A. 22). Thus, petitioner was clearly informed that the subcommittee was investigating Communist activities in the communications industry.

The questions on which petitioner was convicted sought information concerning the Communist activity of persons in the communications industry as to whom petitioner would likely have knowledge. Those questions were on their face clearly pertinent to the subject of Communist activity in the communications industry. As this Court said in *Barenblatt* v. *United States, supra,* where a committee was investigating

Communist infiltration of education: "petitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency of course was clear beyond doubt." 360 U.S. at 125.

Moreover, when petitioner refused to answer whether the person who had recruited him into the Party was a communications worker (Count one), the staff director of the Committee explained that "[i]f the person who enlisted you into the Communist Party was engaged in the communications field, that person undoubtedly would have some information which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country" (J.A. 28). After the staff director said that the Committee had information of at least one Communist cell in the "establishment" where petitioner worked, he asked petitioner if he knew any persons in Western Union to be Communists at any time (Count two, which was dismissed) (J.A. 30–31). The staff director then explained the pertinency of this question (J.A. 31):

> I say to you that the pertinency of that question is this: If you do have such information and if we can get the names of those people and if we can get them to testify, we will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation.

After petitioner was asked and refused to answer the questions involved in Counts three and four he was

told that the previous explanations of pertinency applied to this question (J.A. 34).[7]

b. Since, as we have shown above, the subcommittee clearly apprised petitioner of the pertinency of the question to the subject under inquiry, the government proved at petitioner's trial the pertinency of the questions. For the transcript of the hearings was introduced at the trial (Gov. Ex. 8).

5. Lastly, petitioner contends (Pet. 13–16) that the trial court erred in denying petitioner's motion for a hearing in which to prove that government employees on the grand jury were biased against him. As we will show in our brief in *Shelton* v. *United States*, *supra*, a defendant is not entitled to a hearing as to the bias of grand jurors unless he, at the least, alleges specific and convincing facts of strong bias in individual grand jurors. As in *Shelton*, however, petitioner claimed only that government employees in general are biased in cases involving security issues because of the government's loyalty and security programs (see J.A. 5–9). He is not entitled to a hearing to conduct a general exploration into the motives of each of the fifteen government employees on the grand jury.

[7] Petitioner notes (Pet. 9) that he was not told that the previous explanations of pertinency applied to the question involved in count four until after he had been directed to answer (J.A. 34). But petitioner could have asked to answer the question after the pertinency was explained to him. Moreover, as we have shown above, the further explanations of pertinency after petitioner refused to answer were not necessary; the questions were on their face pertinent to the subject under inquiry which had been fully explained to petitioner at the start of the hearings.

CONCLUSION

Since several of the issues in this case are now pending before the Court in other cases, the Court may wish to defer passing on the petition for a writ of certiorari until those cases are decided. We respectfully submit, however, that, for the foregoing reasons the decision below is correct and that ultimately the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER

Opinions Below

The District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is not officially reported, and is printed at R. 119.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1961. A petition for certiorari was granted on December 4, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioner was convicted of contempt under 2 U. S. C. 192 and was sentenced to four months imprisonment and

a fine of $100 for refusing to answer certain questions at a hearing of a Sub-Committee of the House Un-American Activities Committee (hereinafter referred to as the Committee). The questions presented are:

1. Were the questions which petitioner refused to answer pertinent to the subject under inquiry by the Committee and was that pertinency made clear to the witness?

2. Was there a probable cause sufficient to justify issuance of a subpoena to petitioner?

3. Did the public interest involved in securing answers to the questions here at issue outweigh petitioner's rights under the First Amendment and the public interest in preserving freedom of speech.

4. Did the District Court err in refusing to permit the introduction of testimony relating to the relative weight of the public and the private interests affected by the investigation of the Committee?

5. Was the statute under which petitioner was convicted unconstitutionally vague?

6. Was the investigation being carried on by the Committee pursuant to a bona fide legislative purpose?

7. Was the investigation carried on by the Committee permissible under the First Amendment to the Constitution?

8. Was the resolution establishing the Committee invalid for vagueness?

9. Was the inquiry conducted by the Committee within the scope of the resolution creating it?

10. Should the indictment have been dismissed because of the presence of government employees on the grand jury?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the First, Fourth and Fifth Amendments to the Constitution of the United States.

The statutes involved are:

(1) 2 U. S. C. § 192, which reads as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

(2) Legislative Reorganization Act of 1946, Public Law 601, 79th Congress § 121 and House Resolution 5 of the 83th Congress, which reads in relevant part as follows:

> "(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:
>
> "RULE XI
>
> "*Power and Duties of Committees*
>
> "(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively * * *.

"(q) (1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversion and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Statement

Petitioner was subpoenaed to appear before the House Un-American Activities Committee by subpoena issued June 21, 1957, five days after the decision of this Court in *Watkins* v. *United States*, 354 U. S. 178 (R. 14). He appeared before the Committee on August 2, 1957 (R. 15). He testified, under questioning by Committee counsel, that he was at that time employed by Western Union Telegraph Company, and that he had been so employed for 41 years. In the course of his work he had access to "Government coded messages," but he had no way of telling whether they were security messages or not (R. 24, 25). He said that he had been a member of the Communist Party "for a brief period" in about 1948 but was no longer a member (R. 26). He drifted away almost immediately and was never active (R. 26). He attended meetings infrequently (R. 33, 34).

He was then asked what group of the Communist Party he was a member of. He refused to answer on grounds of lack of jurisdiction of the Committee, his rights under the

First Amendment, the vagueness of the resolution setting up the Committee and lack of pertinency. He relied heavily on the decision of this Court in the *Watkins* case (R. 26; 67-71).

The following colloquy immediately ensued:

> "Mr. Scherer: You refused to answer Mr. Arens' question as to the person who recruited you in the Communist Party. You refused to identify that person.
>
> Now, without identifying him or telling us his name, is that person still a member of the Communist Party today?
>
> (The witness confers with his counsel.)
>
> Mr. Silber: I have no knowledge of such—
>
> Mr. Scherer: Is he still associated in the same type of work you are associated in?
>
> (The witness confers with his counsel.)
>
> Mr. Scherer: As a communications worker?
>
> Mr. Silber: To the best of my knowledge he is no longer in the industry.
>
> Mr. Scherer: Was he a communications worker?"

This last question forms the basis of Count 1.

After the witness' refusal to answer on the grounds previously given, counsel for the Committee stated that the Committee was considering legislation to safeguard the nation from possible espionage or sabotage of communications facilities and that if the person who enlisted petitioner into the Communist Party was in the Communications field, "that person undoubtedly would have some information of use to the Committee in developing facts respecting Communist penetration of the communications facilities of this country" (R. 28).

After some further colloquy, the witness persisted in his refusal for the reasons stated above, and added:

> "Mr. Silber: Including the matter of personal conscience which prevents me from doing things that

I am not sure of, and also on the grounds that I don't see what this question has to do with the question [of] propaganda which this committee is concerned with." (R. 30)

Subsequently in the hearing the following occurred:

"Mr. Scherer: What union do you belong to?
Mr. Silber: The American Communications Association.
Mr. Scherer: Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?
Mr. Silber: I must decline to answer that, sir.
Mr. Scherer: I ask that you direct the witness to answer the question.
Mr. Doyle: I direct you to answer the question.
Mr. Silber: I must decline on all the grounds previously stated.
Mr. Scherer: Were any of the present officers of your union members of the Communist Party at the time you were in the party?
Mr. Silber: I must decline for the same reasons. I must decline to answer.
Mr. Scherer: I ask that you direct the witness to answer the question.
Mr. Doyle: I direct you to answer the question.
Mr. Silber: I must decline to answer.
Mr. Scherer: And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced." (R. 34).

These two questions constitute Counts 3 and 4.

The witness was not asked any questions concerning his own activities in the Communist Party. When he was excused, the Chairman of the Subcommittee congratulated the witness "for getting out of the Communist group when you did." He urged the witness to help the Committee, but the witness responded:

"I have given you the best answer that I could under the circumstances. I have a conscience to protect, and other things. I am sorry." (R. 35)

The House of Representatives subsequently cited petitioner for contempt. He was indicted on or about August 4, 1958, by a grand jury in this District. He moved to dismiss the indictment and for a hearing on the qualifications of the grand jurors, filing an offer of proof in connection with the latter motion (R. 3-9). The motions were denied, except that Count 2 was dismissed (R. 10).

At the trial, the only witness for the prosecution was counsel for the Committee, Mr. Arens. After stating that the Committee had decided to proceed with the investigation, he testified that it caused a subpoena to be issued to petitioner stating that the Committee had information "that Mr. Silber had been a member of the Communist Party engaged in the communications field" (R. 15).

On cross-examination Mr. Arens testified that he had previously been special counsel to the Internal Security Subcommittee of the Senate Committee on the Judiciary and that in 1951 he had conducted an investigation into communism in the communications industry, particularly into the American Communications Association, the union of which petitioner was a member and which was the subject of Counts 3 and 4 of the indictment. The witness recalled a "synopsis of some kind" resulting from that investigation (R. 38).[1] Again in 1954 he conducted a hearing into the communications industry.[2]

Mr. Arens further testified that the information he received from the Committee files and from Committee

---

[1] In fact a "Progress Report" was issued by the Senate Committee in 1951 and a "Supplemental Report" in 1952. (See Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess., May 14-June 14, 1951, at p. v, and Supplemental Hearings, 82nd Cong. 2nd Sess., Jan. 22, 1952, at p. v.)

[2] See hearings before the same Subcommittee Dec. 1953-March, 1954, 83rd Cong. 2nd Sess., entitled "Subversive Influence in Certain Labor Organizations."

investigators was sufficient in his mind to justify the issuance of a subpoena to the petitioner. This testimony will be considered in more detail in connection with the discussion of Point II, *infra*.

After the Government rested, an offer of proof was made by the petitioner relating to his contention that his individual and the public interest in protecting his rights of free speech and assembly and his right of privacy overbalanced the public interest in securing answers to the questions put to him (R. 94-96; 97-118). The offer was rejected, and petitioner rested (R. 96). After trial the Court denied a motion for direction of acquittal and found petitioner guilty on all three counts (R. 96). He was sentenced to imprisonment for a term of four months and to pay a fine of $100, the sentence being "on the indictment rather than on the individual counts" (R. 97). He was continued at large on bond of $1,000.

The Court of Appeals affirmed on June 30, 1961 (R. 119).

Summary of Argument

I

Petitioner admitted casual membership in the Communist Party 9 years prior to his interrogation; he answered all questions pertaining to himself and his own activity but declined to answer certain questions on the ground that it would require the naming of other persons. His objection was based, *inter alia*, on First Amendment grounds, lack of pertinency and the fact that his conscience would not permit him to name others. On the record here, it is clear that the purpose of the Committee was not to secure information for legislative purposes, since it addressed no such questions to the petitioner, but, rather, to secure the names of other persons, and thus to expose their political affiliation.

Furthermore, the remoteness in point of time of petitioner's membership in the Party and his knowledge of party activities destroyed whatever pertinency the questions might otherwise have had.

II

In *Barenblatt* v. *United States*, 360 U. S. 109, this Court held that "where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." The instant case presents questions involving the application of the "balancing" doctrine in two respects: First, the testimony which the Committee sought to elicit from the petitioner was partly cumulative and partly merely corroborative of sworn testimony already in the possession of the Committee; furthermore, it would have compelled petitioner to become an informer, in violation of his reasonable conscientious scruples. Hence, the public interest in securing such trivial information could not outweigh the substantial public and private interests protected by the First Amendment. Second, the District Court erred in refusing to accept expert testimony offered to establish that the basic premise upon which the Committee seeks to justify its interrogation, namely, that there is a danger to internal security which justifies interference with First Amendment rights, is not supported in fact. Under the circumstances shown by this record, the issues should be resolved by a determination that the First Amendment rights asserted by the petitioner are sufficient to bar governmental interrogation.

III

The alleged ground for issuance of a subpoena to petitioner consisted, first, of the fact that he had at some undetermined year in the past signed a Communist Party nomi-

nating petition and, second, that an unidentified and unknown informer had named him as a Communist. This does not constitute "probable cause" for the issuance of a subpoena within the meaning of *Barenblatt* v. *United States*, *supra*, and *Wilkinson* v. *United States*, 365 U. S. 399. Lawful participation in an election campaign, together with gossip and rumor, without more, do not justify subpoenaing a witness before a Congressional committee.

IV

Rule XI of the Rules of the House, read in conjunction with 2 U. S. C. § 192, is too vague to support a criminal conviction. The meaning attributed to it by this Court in the *Barenblatt* case can be derived from the language of the rule only through extensive investigation into legislative history. Such an investigation is not justified in a criminal prosecution. The Fifth Amendment requires that a criminal statute, to support a conviction, must be clear on its face.

V

Fifteen members of the Grand Jury were Government employees and, under the circumstances, petitioner should have been offered the right to conduct an inquiry into their possible bias in a case of this nature. The Court below erred in denying the motion for such inquiry.

VI

The powers exercised by the Committee are outside its jurisdiction and in violation of the First Amendment to the Constitution.

This point is not briefed herein since it appears to be in conflict with the decisions of this Court in the *Barenblatt*

and *Wilkinson* cases, and *Braden* v. *United States*, 365 U. S. 431, but petitioner does not wish to be understood to have acquiesced in those decisions without, at least, this note of protest.

POINT I

The questions which petitioner refused to answer were not pertinent to the subject under inquiry by the Committee.

This case presents directly for decision the question which this Court declined to consider in *Barenblatt* v. *United States*, 360 U. S. 109 namely, whether a witness may be held for contempt for refusal to answer questions relating to the names of other persons who are associated with him in political activity under investigation by the Committee. This Court will recall that Count 3 in *Barenblatt* related to the following question:

> "Now you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?"

This Court stated, at page 115:

> "As we conceive the ultimate issue in this case to be whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country, we find it unnecessary to consider the validity of his conviction under the Third and Fifth counts, the only ones involving questions which on their face do not directly relate to such participation and knowledge."

The three questions at issue here likewise do not relate to petitioner's participation in or knowledge of alleged Communist Party activities, but rather to the identity of

other persons in the Party. This Court in specifically omitting consideration of this question in *Barenblatt*, in effect reserved decision on that issue for subsequent cases. The issue is now squarely presented in this case.

The Government argued in its opposition to the petition for certiorari that the questions which are the subject of the indictment had relevance independent of their value in disclosing the names of party members. This may or may not be true but it is clear from *Watkins* and *Scull* v. *Virginia*, 359 U. S. 344 that the pertinence of questions must be explained to the witness, especially when, as here, he objected on grounds of lack of pertinence (R. 71, 29, 31). To argue now, as an afterthought, that the answers to the questions would "probably provide information of considerable value to the Committee" (Brief for the United States in opposition to petition for certiorari, p. 12) is a belated and impermissible effort to justify a relevancy argument that was never made to the witness and, hence, cannot be made now. To permit such a change in theory would not only fail to meet the test of clarity required by *Watkins*, but would constitute the "active misleading" condemned in *Raley* v. *Ohio*, 360 U. S. 423.

The explanation of pertinency to the witness is clear beyond any shadow of doubt. Mr. Arens explained the pertinency of the first question as follows:

> "If the person who enlisted you into the Communist Party was engaged in the communications field, that person undoubtedly would have some information which would be of use to this Committee in developing facts respecting Communist penetration of the communications facilities of this country" (R. 28).

In explaining the pertinency of the question in Count 2 (dismissed before trial) Committee counsel had the following to say:

> "If you do have such information [as to whether there are persons engaged at Western Union who at any time were known to appellant as Communists] and if we can get the names of those people and if we can get them to testify, we, will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation" (R. 31).

In explaining the pertinence of the questions contained in Counts 3 and 4, Congressman Scherer said:

> "And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons he advanced" (R. 34).

The witness was, so far as the record appears, willing to answer all questions concerning his own activities in the Communist Party. True, the Committee which is always more interested in names than in substance, showed a lack of interest in such activities and asked no questions concerning them. But the witness' refusal related only to the activities of other persons.

In effect, therefore, the questions put to petitioner really constituted a discovery proceeding. The Committee was using him, not to get evidence concerning his own activities in the Communist Party but to get the names of other persons so that they in turn could be questioned. We do not understand that the Committee has any such authority, or that such inquiry constitutes a proper legislative purpose.

This Court has made it clear enough that in this area, in which a close balance exists between the individual and public rights involved, the issue of pertinency should be scrutinized with great care. *Sacher* v. *United States*, 356 U. S. 576; *Deutch* v. *United States*, 367 U. S. 456; *Watkins*

v. *United States, supra.* And see *United States* v. *Orman,* 207 Fed. 2d 148 (C. A. 3, 1953). The questions here under consideration cannot bear such scrutiny.

Furthermore, it must be noted that petitioner had not been a member of the Communist Party for about nine years prior to his testimony. The Committee was indeed reaching far back to secure information which might have served Congress in 1957 when the witness testified. Testimony as remote as any the petitioner was requisitioned to give likewise fails to meet the test of pertinency. *Bowers* v. *United States,* 202 Fed. 2d 447 (C. A. D. C., 1953); *Deutch* v. *United States, supra.*

Finally, a consideration of the testimony relating to the specific counts on which petitioner was convicted would call for a reversal. Indeed, the first count involves a question which seems to have been answered immediately prior to the refusal to answer. It will be noted (R. 27, 28) that Mr. Scherer asked, "Is that person still a member of the Communist Party today * * * as a communications worker?" The petitioner answered, "To the best of my knowledge he is no longer in the industry." He was then asked, "Was he a communications worker?" It would seem that the response immediately preceding the question which forms the basis of Count 1 had been sufficiently answered by the witness by the response that "he is no longer in the industry."

The record with respect to Counts 3 and 4 is likewise insufficient in that no explanation of pertinency was made until after the witness had been directed to answer the questions and he had refused to do so. The witness was never given an opportunity to make answer after pertinency had been pointed out to him. Clearly, his refusals when made were proper and he cannot be held for contempt in the absence of a clear statement of pertinency *before* the direction of an answer.

POINT II

In the circumstances shown here petitioner's interest in the protection of his First Amendment rights, and his right of conscience and the public interest in both outweighed the public interest in securing answers to the questions which were the subject of the indictment.

We think this Court made a serious error when it said in *Barenblatt* v. *United States*, *supra*, at 126:

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."

We suggest that this was a mistake for two reasons. Fundamentally it reduces the force and significance of those basic rights protected by the First Amendment which are essential to the preservation of our democracy (see dissenting opinions in *Barenblatt* v. *United States*, *supra*, at page 134; *Wilkinson* v. *United States*, 365 U. S. 399, 415; and *Braden* v. *United States*, 365 U. S. 431, 438). In addition, the Court has set up a standard of criminal liability which is difficult, if not impossible, to apply and which adds immeasurably to the vagueness which is inherent in the resolution which defines the Committee's jurisdiction. See *Watkins* v. *United States*, *supra*, at 202.

However, this Court has made its decision, and is therefore confronted with the task of defining and exploring the "balancing concept" which has been the subject of so much discussion in the past few years. See dissenting opinions cited above; also *Koenigsberg* v. *California*, 366 U. S. 36, 56; *Bates* v. *City of Little Rock*, 361 U. S. 516 and many other cases. Also, Kalven: *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 Univ. of Chicago, L.

Rev. 314; Kalven and Steffen: *The Bar Admission Cases*, 21 Law in Transition 155, 173; Charles Black: *Mr. Justice Black, The Supreme Court and the Bill of Rights*, 222 Harpers Magazine 63 (February, 1961); Meiklejohn: *Political Freedom* (1960). This is a very difficult task but must be undertaken unless the process of balancing is to become a cover-up for arbitrary and *ad hoc* decisions which would be intolerable in any case but even more so in a criminal prosecution.

The questions raised by the *Barenblatt* formula are many and most of the answers await illumination by this Court. We are required to balance competing rights and interests. The private right involved in this case is quite clear. It is the right to refuse to be an informer—the right to retain his self-respect and self-esteem. As the New York Court of Appeals has said: "Informers have always been a despicable race" (*In the Matter of—*, an attorney, 86 N. Y. 563, 570). And petitioner sought to avoid that deep stigma, which is universally attached to such "viperous vermin" (Coke, *Third Institute*, 194, 4th ed. 1669).

The public interests are not so easy to define, but they would seem to fall, some on one side and some on the other side of the scale.

On the one side, in favor of the broad right of governmental interrogation, is the vital interest to protect public order against subversion and illegal or violent overthrow; on the other is the public interest in keeping open channels of free discussion so that our democracy may live.

Having once determined on the scope of private rights and public interests to be weighed in this balance, the next question is who performs this weighing operation and how. Clearly the balance must be struck by the Court rather than the legislature because otherwise the determination of the legislature to invade private rights would be deci-

sive, and we know that this cannot be true. *Bates* v. *City of Little Rock, supra; National Association For The Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344; *Shelton* v. *Tucker*, 364 U. S. 479.

But this leaves open two critical issues: (1) how does the Court get the information which would enable it to balance private rights and public interests, and (2) what did this Court mean when it directed that the balance was to be related to "the particular circumstance shown." Did the Court mean that in the circumstances in which we now find ourselves, in this decade of the Twentieth Century in the United States, free speech rights and the right to remain silent, asserted by alleged Communists *never* outbalance the Government's right to interrogate (as compared, for example, to the constitutional rights asserted by Negroes which evidently always outweigh governmental interrogation by southern states)? Or did this Court mean that the Trial Court would hear evidence on the circumstances shown in each case and would, on that evidence, decide the way the balance must fall?

This case was tried shortly after the decision in *Barenblatt* had made it clear that the rights which we thought were protected by *Watkins* and *Sweezy* v. *New Hampshire*, 354 U. S. 234 were in fact not protected at all. So petitioner and counsel addressed themselves to the problem of balancing in accordance with the opinion of the Court in *Barenblatt*. We argued below, and argue here, that in our system of laws, guilt is individual and each defendant is entitled to be tried on the record made in his own individual case. It follows that the Trial Court must, in each case, weigh the evidence separately. Among the elements to be considered in determining guilt is the balance that this Court has ordered to be struck between the various rights and interests at stake and so we offered evidence, first, that in view of the information already in

the possession of Congress, the interest of Congress in getting the additional information it sought from petitioner was trivial and could not outweigh the public interest and private rights on the other side of the scale, and, second, that the general political situation was such that the information sought by the Committee was not substantial.

The Court below disposed of this argument with the remark that "this 'balancing' is strictly a matter of law for decision by the Court and, therefore, 'expert' testimony is irrelevant" (R. 123).

We respectfully suggest that this holding is an evasion of the issue. The question remains, how does the Court decide? Does each Judge make this decision on the basis of his personal political views as to the relative importance of things in this changing world so that the standard is as variable as the Chancellor's foot, or does the Court act in what we have all understood to be a judicial manner, namely, upon the consideration of objective facts presented to it on the basis of a record made in open court with full opportunity on the part of all parties to present these facts and have them determined by the tribunal?

A

The testimony which the petitioner was called upon to give was, at most, cumulative and the public interest in securing such information was trivial.

This is not the first time there has been a Congressional investigation of "Communist infiltration" in the telegraph industry. As Committee counsel testified, similar investigations have been carried out over a period of years (R. 38, 39; see footnotes 1 and 2, p. 7, *supra*). These prior hearings were not casual or preliminary to the hearing at which petitioner testified, but occupied several hundred pages of testimony and involved the naming of over 100 alleged Communists in the industry. At the several hear-

ings mentioned above, many names were repeated over and over again by the various witnesses called.

Petitioner's membership in the Party had been remote in time and casual in substance. At the most, if he had answered, he might have added to the hundred or more names already in the possession of Congress, the names of two or three more persons who might or might not have been called by the Committee to add a few words to the thousands of words already in the record. There is nothing to suggest that this witness could have named anyone who could have come forward to add anything of significance to the vast bulk of material already submitted to the Congress on this and other occasions. Any testimony he might have added would have been entirely cumulative and of such trivial nature that it is difficult to understand how it can be said to outweigh any private interest at all. As the record of those hearings shows, there have been many witnesses in the industry who have come forth voluntarily to give testimony to the Committee and certainly Congress had all of the information it could conceivably need to consider any legislation on this subject.

Against this we must weigh the very substantial rights of the petitioner. In addition to the constitutional rights which this Court agreed were of utmost importance in *Watkins*, *Sweezy* and *Barenblatt*, there is here an additional right, namely, the right to remain silent and to refuse to be an informer.

The role of an informer, throughout the history of the human race, has been a despicable one. Twice in the course of his testimony the witness referred to his conscientious scruples, in addition to the extensive legal arguments proposed by him (R. 30, 35). If there ever was a case in which substantial and important private rights might be said to outbalance the public interest in securing trivial and useless information, this record presents that case.

B

The Court erred in excluding from the record the proffered testimony of Professor Emerson, offered on the issue of the balancing of public interest.

If the Court, in its enigmatic language in *Barenblatt* meant to refer, not to the specific circumstances surrounding a particular hearing, but rather to a general political situation which is presumed to exist, we must, difficult though it may be, address ourselves to this general political situation.

It should be noted first, that this Court does in fact balance interests separately in each case. Thus in *NAACP* v. *Alabama*, 357 U. S. 449, and *Bates* v. *City of Little Rock*, 361 U. S. 516, the Court did consider the facts separately. And, after balancing them, it came to the conclusion that the rights of the individuals involved outweighed the right of the state in securing information which impinged on First and Fourteenth Amendment rights. The same procedure should have been followed here but it was not.

In the *Barenblatt* case, the Court (at p. 128 *et seq.*) made certain "findings" with respect to the alleged threat of Communism to the United States. We assume that those findings were made on the basis of the record in that case, together with additional facts of which the Court took judicial notice.

In the instant case there are no facts in the record for the basis on which any finding could be made that Communism constitutes a sufficient threat to the communications industry in the United States or to our internal security to justify interference with First Amendment rights which, it must be generally conceded, exist here. So we must assume that the District Court took judicial notice of the facts it was required to find under the *Barenblatt* decision, namely, that in balancing the competing rights and public interests at stake in these circumstances, governmental interrogation was permitted.

Generally speaking, a court may take judicial notice of facts which are "common knowledge" but the doctrine of judicial notice can never constitutionally be utilized to bar evidence seeking to contradict such "common knowledge". Testimony is always admissible on any factual issue before the Court. As the Supreme Court said in *Ohio Bell Telephone Co.* v. *The Public Utilities Commission of Ohio*, 301 U. S. 292, 301:

> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence, Wigmore, Evidence § 2567; 1 Greenleaf, Evidence, 16 Ed., p. 15. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*"

In *Grand Opera Co.* v. *Twentieth Century Fox Film Corp.*, 235 F. 2d, 303, 307 (C. A. 7, 1956), the Court said:

> "Judicial notice is merely a conventional method of taking evidence to establish facts."

To the same effect, see *In Re Bowling Green Milling Co.*, 132 F. 2d, 373 (C. C. A. 6, 1942); *United States* v. *Aluminum Co. of America*, 148 F. 2d, 416 (C. C. A. 2, 1945).

In order to establish his contention, that in the circumstances shown in this case private and public interests in protecting freedom of speech outweighed the public interest in permitting interrogation, petitioner offered expert testimony on the subject, it being difficult to conceive of any alternative way in which proof addressed to this issue could be presented in a court. Hence, expert testimony of Professor Thomas I. Emerson, Professor of Law at Yale University was prepared in writing and was submitted to the Court at the trial for a ruling as to admissibility. The Court refused to accept the testimony, but the offer of proof is a part of the record and appears at R. 97-118. This testimony may be summarized as follows:

The witness first qualified himself as an expert, setting forth his professional background since his graduation from Law School in 1931. After extensive and widespread experience in government service he became a member of the faculty at Yale Law School in September, 1946. Since that time his major field of research has been public law and within that general area, political and civil rights. He has written a two volume work on the subject, a second edition of which was published in 1958, and since 1946 he has maintained an extensive file of material on this subject. In the academic year 1953-1954 he studied civil liberties in Great Britain; for the academic year 1960-1961 he received a Fellowship from the Ford Foundation to study the legal foundations of the right of political expression. He is in close touch with other academic communities through contacts with faculty members, students and other organizations within various educational institutions. He is fully familiar with the work of the House Committee on Un-American Activities (R. 97-101).

Professor Emerson then outlined in considerable detail legislation already in existence relating to the protection of internal security in the United States. He discussed the social conditions which might give rise to political and social unrest, and the strength of the Communist Party, the organization against which this Committee has directed most of its activities. He pointed out that in political activity, in industry, agriculture, labor, religion, education and in other areas of American life the Communist Party has substantially no influence (R. 102-113).

Professor Emerson then turned "to the other side of the scales" and considered the interest of the individual and of society in freedom of speech. He discussed the interests of the individual in his right of expression and in his right of silence and the nature of the interest of society in freedom of political expression in a democratic

society. Such a right of expression is, he pointed out, necessary to a healthy functioning of society. He considered in some detail the economic and social effects upon the witness called before the Committee as well as the effect on his right of association (R. 113-117).

In conclusion Professor Emerson stated as his opinion

> "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society" (R. 117-118).

We shall not here consider the merits of Professor Emerson's testimony or its weight but only its admissibility. It seems clear that if the balancing concept established by the Court in the *Barenblatt, NAACP, Scull and Shelton* cases, *supra*, is to be applied in a way that will protect the constitutional liberties of petitioner and others similarly situated, testimony on the subject must be admissable. Otherwise, there is no way in which the Court can balance those interests save by its own speculation.

POINT III

There was no showing of probable cause sufficient to justify the issuance of a subpoena to petitioner.

The Supreme Court in *Barenblatt* said, at page 134:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."

**

The Court, in a footnote, referred to page 124 and to note 24 of the opinion. The references are to sworn testimony given before the Committee identifying Barenblatt as a member of the Communist Party, and to evidence in its files to the same effect. Similar language, and a similar footnote appear in *Wilkinson* v. *United States*, 365 U. S. 399, 412, footnote 9.

Eleven witnesses appeared before the Committee in July and August, 1957 at the hearings at which petitioner testified, and named about sixty persons as having been members of the Communist Party.[3] In the 1951, 1952 and 1954 hearings before the Senate Committee (conducted by Mr. Arens, presently counsel to the House Committee) about a hundred more had been named as members of the Communist Party by witnesses appearing before those Committees.[4] No one had ever named petitioner either as a member of the Communist Party or in any other respect. At the trial, the prosecution presented testimony, through its only witness, Mr. Arens, that the Committee had information in its files as to the Communist Party membership of petitioner, but he did not state the nature of that information. On cross-examination it appeared that the evidence in the Committee's files consisted of:

(1) A photostat of the New York Times dated January 15, 1940, over 17 years prior to the issuance of the subpoena to the witness, which stated that, in a factional dispute within the American Labor Party in New York, 99 persons of whom petitioner was one, had been named as "Reds" by the opposing political group because they

[3] Hearings before the Committee on Un-American Activities, 85th Congress, 1st Session, pp. 1377-1529.

[4] See hearings cited at footnote 2, p. 7, *supra*.

had signed Communist Party nominating petitions (Deft.'s Ex. 3), and

(2) A report in the Committee file, reading as follows:

"CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

Committee on Un-American Activities
Washington, D. C.
MEMO

June 12, 1957

To: Mr. Richard Arens, Director

FROM: Louis J. Russell
Investigator

SUBJECT: Bernard Silber

This individual is employed as a service writer by Western Union and as such would have access to messages and facilities of the Western Union which would present sabotage and espionage possibilities.

As a service writer, his position would be considered important.

He signed Communist Party petitions on behalf of Israel Amter and Benjamin Davis.

His son, whose first name is unknown, was also identified as a member of the Communist Party by a confidential source.

LJF:v" (Deft.'s Ex. 4)

It is submitted that this information does not establish probable cause to justify the calling of petitioner as a witness, and that the subpoena issued to him resulted from exactly the kind of "indiscriminate dragnet procedures" which the Court condemned in *Barenblatt*.

The issue of probable cause in the issuance of a subpoena to a witness was treated exhaustively by the brief submitted in behalf of the petitioner in *Shelton v. United States*, No. 9, at this Term of the Court, and we respectfully refer the Court to the excellent historical discussion contained in

that brief, and particularly at page 29 *et seq.* thereof. We shall not burden the Court with a repetition of that argument but shall add merely a few comments.

The term "probable cause" is no stranger to the law, and its meaning has often been defined. In *Contee* v. *United States,* 215 Fed. 2d 324, 327 (C. A., D. C. 1954), the Court said:

> "An uncorroborated tip of an informer, whose identity and reliability are both unknown, does not constitute probable cause to make an arrest."

In *Cervantes* v. *United States,* 263 Fed. 2d 800, at 803, (C. A. 9, 1959), the Court noted:

> "* * * probable cause means more than a bare suspicion."

And in *United States* v. *Castle,* 138 Fed. Supp. 436 (D. C., D. C. 1955), Judge Youngdahl, in ruling evidence inadmissible said:

> "An arrest or warrant for an arrest may not be based upon the suspicion or opinion of some person, unsupported by personal knowledge of the facts, and a warrant to search a private home may not rest upon a mere statement of suspicion without the disclosure of supporting facts and circumstances to justify the suspicion."

It is also clear that the burden of establishing probable cause is on the Government. *Wrightson* v. *United States,* 222 Fed. 2d 556 (C. A., D. C. 1955); *Cervantes* v. *United States, supra.*

If, as this Court has held, probable cause is necessary for the issuance of a subpoena, it is clear that no probable cause existed here. We do not have, as in *Barenblatt* (and in *Watkins* and in most of the other cases which have come before this Court), sworn testimony identifying petitioner as having been a member of the Communist Party. Instead, we have a tip from undisclosed "confidential sources," who,

so far as we know, were not even known to the Committee. Added to this is the fact that petitioner along with thousands of others, is alleged to have signed a Communist Party nomination petition.[1]

Petitioner, in signing a Communist Party nominating petition (if he did sign) was exercising a constitutional right to participate in the electoral process and a right given under the laws of the State of New York to petition to have a member of the Community Party on the ballot for election to public office.

Evidently petitioner was subpoenaed because over a decade ago he signed one or two Communist Party nominating petitions and, so far as this record shows, for no other reason. If this does not constitute an abuse of the subpoena process such as that referred to by the Court, we find it difficult to conceive of a case in which such abuse could exist.

---

[1] The charge that petitioner was one of 99 "Reds" in the American Labor Party (New York Times, Deft's Ex. 3) was apparently based on the fact that petitioner had signed a Communist Party nominating petition. There is no evidence in the record as to when these petitions were signed. The most recent date on which petitioner could have signed a Communist nominating petition was 1946, when Davis ran for Attorney General of New York State on the Communist Party ticket. A nominating petition for that office would require 12,000 signatures. Amter had run for governor in 1942 and for member of the City Council in 1937 and 1939.

POINT IV

Rule XI read in conjunction with 2 U. S. C. § 192 is too vague to support a criminal conviction.

House Rule XI treated in conjunction with 2 U. S. C. 192 must be treated as a criminal statute. *Sacher* v. *United States*, 356 U. S. 576, 577; *Watkins* v. *United Statese, supra*, at 208. Therefore, to be valid, Rule XI must establish a standard of conduct that meets the test of *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507, and *Raley* v. *Ohio*, 360 U. S. 423. Quite aside from petitioner's right to rely on the decision in *Watkins* which was argued before this Court on behalf of the petitioner in *Braden* v. *United States, supra*, and disposed of by reference to *Sinclair* v. *United States*, 279 U. S. 263, we raise here a due process question going to the uncertainty of the meaning of the criminal statute under which petitioner was convicted. If a criminal statute is uncertain, it cannot support an indictment. This Court said in the *Raley* case, *supra*, at page 438:

> "• • • A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States* v. *Cardiff*, 344 U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson* v. *United States*, 318 U. S. 189, 197. The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances" (360 U. S. 423, 438-9).

It is true that the majority in the *Barenblatt* case was able to assign a meaning to the vague language contained in Rule XI. This it did after a study of the twenty year history of the Committee in the course of which reference was made to debates on the original authorizing resolution in the 75th Congress, to seventeen House Reports from the 76th Congress to the 85th and to twenty-three House Resolutions extending over the same period of time. It may be that such an historical survey justifies the conclusion to which the Court came as to the intent of Congress. The difficulty is that we are not here concerned with the intent of Congress, but rather with the guilt or innocence of petitioner who is entitled to read a statute and to base his conduct on a fair interpretation of the words set forth therein.

It is unreasonable to expect that petitioner would understand that the word "un-American" really meant "Communist Party", especially a few months after the Chief Justice of the United States, in an opinion joined in by a majority of this Court, had been unable to define the words. It is unreasonable to expect that petitioner would interpret the words "propaganda activities" as meaning "any activity". Indeed the witness himself indicated his understanding that the statute referred only to propaganda activity (R. 30).

We know of no case prior to *Barenblatt* in which a Court was compelled to rely on legislative history in order to uphold a criminal conviction and we respectfully suggest that to the extent to which the Court was compelled to rely on such history in the *Barenblatt*, *Braden* and *Wilkinson* cases it did so in clear violation of the most fundamental rights guaranteed under the due process clause. If a statute is clear on its face (and no one can reasonably contend that this statute is clear), there is no occasion to resort to legislative history; if a state is unclear on its face it cannot support a criminal conviction.

We are aware of the fact that the contention we are here making was inherent in the record in *Barenblatt*, *Braden* and *Wilkinson* and it seems to have been argued in the *Braden* case. However, it was not considered in any of the three opinions.

Assuming that the Committee had the jurisdiction it claims (as the Court found in *Barenblatt*) and assuming further that the intent of the defendant in a § 192 case is not relevant, as the Court held in *Sinclair* and *Braden*, the constitutional objection remains that the statute is unclear and that the tests set forth by this Court in the earlier cases, cited above, cannot be met.

POINT V

The indictment should have been dismissed because of the presence of Government employees on the Grand Jury.

Fifteen members of the Grand Jury which indicted petitioner were employees of the United States Government (R. 5). On September 16, 1958, the petitioner moved to dismiss the indictment on the ground, among others, that the indictment was not found by a sufficient number of qualified and unbiased Grand Jurors (R. 4). Several days later a motion for a hearing on the motions of the qualifications of the Grand Jurors was filed, together with an offer of proof (R. 5-9). The motion was denied by the Court and this question was reserved for argument here.

This issue has already been presented to the Court in many cases at this Term, including *Russell* v. *United States*, No. 8, *Shelton* v. *United States*, No. 9, *Liveright* v. *United States*, No. 11, *Price* v. *United States*, No. 12, *Gojack* v. *United States*, No. 128, and perhaps others. There is little we can add to the learned and extensive discussion by counsel in the briefs submitted in those cases, and par-

ticularly in the briefs submitted in behalf of petitioners in *Russell* and *Liveright*. Since we have no desire to burden the Court with excesive duplication of material which has been presented to it in other briefs, we respectfully refer the Court to those briefs. To the best of our knowledge, the issue presented in all of those cases is identical in all substantial respects with that presented in the instant case.

POINT VI

The Committee acted in violation of the First Amendment to the Constitution and in excess of its authority.

In the *Barenblatt*, *Braden* and *Watkins* cases, to say nothing of the other cases argued at this Term of the Court, the petitioners generally have contended that there was no genuine legislative purpose to the investigation carried on by the Committee and that the Committee in general was engaged in activities which violated the First Amendment to the Constitution. This Court has on several occasions now, by closely divided vote, rejected these arguments and we shall therefore not set them forth again. We mention them here merely as a reminder to the Court that in the opinion of many this Committee constitutes a basic threat to American freedom and that it has over a period of a generation functioned in violation of the constitutional rights of those who have been called before it.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

I

The Government has evidently misunderstood, and hence has failed to meet, the nature of the argument made by petitioner in Point II of his original brief in this case, which addresses itself to the "balancing doctrine" as applied by this Court in *Barenblatt* v. *United States*, 360 U. S. 109; *Bates* v. *City of Little Rock*, 361 U. S. 516; *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344 and *Shelton* v. *Tucker*, 364 U. S. 479.

Our argument is restated, we hope more clearly, at pages 1 to 5 of the reply brief filed in *Yellin* v. *United States*, No. 477 this Term, where the same situation exists, and this Court is respectfully referred to that reply brief.

II

In its effort to justify the questions put to petitioner, the Government now contends that they had pertinency other than the Committee's never-ending quest for names (Government's Brief, pp. 24, 34, 50). To this argument, there are two answers:

First, at the hearing the Committee itself claimed, as the only pertinency of the questions at issue, the fact that the answers would supply the names of more prospective witnesses (Record 28, 31, 34). The Committee is bound by its own explanation of pertinency and may not now think up new justifications of the questions put (*Watkins* v. *United States*, 354 U. S. 178, 214-215; *Deutch* v. *United States*, 367 U. S. 456, 468).

Second, the new justification of pertinency is not borne out by the record. It is argued at page 34 of the Government's brief that the answers to the questions actually asked "would in and of themselves have provided information of considerable value to the Committee." We fail to see how, and the Government no more explains this justification for pertinency in its brief, than the Committee did at the hearing. The declared purpose of the Committee was to ascertain current evidence of "Communist activity" so that the Congressional Committee hearings of earlier years could be brought up to date (Government's Brief, p. 46). In view of the fact that the petitioner had not been a member of the Party for about nine years and that, indeed, his disassociation from the Party had preceded the earlier Congressional hearings, we can see no possible relevance to the answers "in and of themselves".

III

The Government, in arguing that there was no probable cause for the issuance of a subpoena to petitioner, refers to the *Barenblatt* case and particularly to footnote 24 at 360 U. S. 125. The language there used by the Court might better be cited in support of petitioner's contention. According to this Court in *Barenblatt*, there was material in the Committee files, "some . . . in the nature of evidence," showing "clearly" that Barenblatt had information about the subject under inquiry, namely, "Communist infiltration into the field of education" (360 U. S. at 113). But in this case there was (1) nothing at all in the Committee files "in the nature of evidence" but rather scraps of rumor and gossip about petitioner's activities many years before and about the political beliefs of his son; and (2) even this gossip did not relate to the subject under inquiry, namely, Communist activity in the communications industry in 1957.

The Government, to add weight to its "probable cause" argument further points out that petitioner was a member of American Communications Association and apparently urges that that fact alone can be cited as "probable cause" for the issuance of a subpoena. But this argument serves merely to underline petitioner's point. American Communications Association has thousands of members and certainly the issuance of a subpoena on that basis constitutes the most indiscriminate type of the dragnet procedure forbidden by this Court.

April 16, 1962.

Respectfully submitted.

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